5-22-2008

ICRMP v. Northland Clerk's Record v. 1 Dckt. 34375

LAW CLERK

Vol. 1 of 3

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

PLAINTIFF-APPELLANT,

vs.

NORTHLAND INSURANCE COMPANIES, a Minnesota corporation,

DEFENDANT-RESPONDENT.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

Hon DARLA S. WILLIAMSON, *District Judge*

PHILLIP J. COLLAER

Attorney for Appellant

DONALD J. FARLEY

Attorney for Respondent

34375

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff-Appellant, vs. NORTHLAND INSURANCE COMPANIES, a Minnesota corporation, Defendant-Respondent.	Supreme Court Case No. 34375

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE DARLA S. WILLIAMSON

PHILLIP J. COLLAER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

DONALD J. FARLEY

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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9/14/2006	NCOC	CCWOODCL	New Case Filed - Other Claims	Darla Williamson
	COMP	CCWOODCL	Complaint Filed	Darla Williamson
	SMFI	CCWOODCL	Summons Filed	Darla Williamson
9/28/2006	AFOS	CCTEELAL	Affidavit Of Service 9.21.06	Darla Williamson
10/20/2006	ANSW	CCWOODCL	Answer to Complaint and Demand for Jury Trial (D. Farley for Northland)	Darla Williamson
10/24/2006	RMK9	DCKORSJP	Order for Scheduling Conference	Darla Williamson
	HRSC	DCKORSJP	Hearing Scheduled (Scheduling Conference 11/30/2006 01:15 PM)	Darla Williamson
10/30/2006	NOTS	CCWOODCL	Notice Of Service of Discovery Requests	Darla Williamson
11/17/2006	MOSJ	CCCHILER	Plaintiff's Motion for Partial Summary Judgment	Darla Williamson
	MEMO	CCCHILER	Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment	Darla Williamson
	AFFD	CCCHILER	Affidavit of Lynnette McHenry in Support of Plaintiff's Motion for Partial Summary Judgment	Darla Williamson
11/21/2006	NOHG	DCKORSJP	Notice Of Hearing on Summary Judgment and Scheduling Order	Darla Williamson
	HRSC	DCKORSJP	Hearing Scheduled (Motion for Summary Judgment 02/01/2007 01:30 PM)	Darla Williamson
11/28/2006	STIP	MCBIEHKJ	Stipulation for Scheduling and Planning	Darla Williamson
	STIP	MCBIEHKJ	Stipulation to Extend Time for Briefs on Motion for Partial Summary Judgment	Darla Williamson
11/30/2006	HRVC	DCOLSOMA	Hearing result for Scheduling Conference held on 11/30/2006 01:15 PM: Hearing Vacated	Darla Williamson
	ORDR	DCOLSOMA	Order Amending Scheduling Order on Summary Judgment	Darla Williamson
12/6/2006	NOTC	DCKORSJP	Notice Of Trial Setting	Darla Williamson
	HRSC	DCKORSJP	Hearing Scheduled (Jury Trial 12/03/2007 09:00 AM)	Darla Williamson
12/11/2006	MOTN	CCMAXWSL	Def't Northland Insurance Companies' Rule 56 (f) Motion RE: Idaho Counties Risk Management Program Underwriters' Motion for Partial Summary Judgment	Darla Williamson
	AFFD	CCMAXWSL	Affidavit of Donald J. Farley in Support of Motion	Darla Williamson
	NOTC	CCMAXWSL	Notice of Hearing (Jan 25, 2007 @ 1:30pm)	Darla Williamson
	HRSC	CCMAXWSL	Hearing Scheduled (Motion for Partial Summary Judgment 01/25/2007 01:30 PM)	Darla Williamson
12/12/2006	RSPN	CCMAXWSL	Defendant's Response to Plaintiff's Motion for Partial Summary Judgment	Darla Williamson
	AFFD	CCMAXWSL	Affidavit of Brian r. Martens in Support of Response	Darla Williamson
12/13/2006	MEMO	CCLEONCR	Memorandum in Opposition To Defendant's Rule 56(f) Affidavit	Darla Williamson

Idaho Counties Risk Management Program Underwriter vs. Northland Insurance Companies

Date	Code	User		Judge
12/19/2006	MEMO	CCWATSCL	Reply Memorandum in Support of ICRMP's Motion for Partial Summary Judgment	Darla Williamson
12/22/2006	MOTN	CCCHILER	Defendant Northland Insurance Companies' Motion to Compel, and Motion for Fees and Costs	Darla Williamson
	AFSM	CCCHILER	Affidavit of Bryan A Nickels in Support of Defendant Northland Insurance Companies' Motion to Compel, and Motion for Fees and Costs	Darla Williamson
	NOHG	CCCHILER	Notice Of Hearing (1/25/07 @ 1:30pm)	Darla Williamson
12/29/2006	NOTS	CCWRIGRM	Notice Of Service	Darla Williamson
1/2/2007	MOTN	CCAMESLC	Northland Insurance Company's Motion to Shorten Time Re: Motion to Compel and Motion for Fees and Costs	Darla Williamson
1/8/2007	NOWD	CCNAVATA	Notice Of Withdrawal of Defendant Northland Insurance Companies' Motion to Compel & Motion for Fees & Costs	Darla Williamson
1/17/2007	AFFD	CCAMESLC	Affidavit in Furtherance of Motion and In Opposition to Plaintiff's Motion for Partial Summary Judgment	Darla Williamson
	BREF	CCAMESLC	Brief Re: Motion and In Opposition to Plaintiff's Motion for Partial Summary Judgment	Darla Williamson
1/25/2007	INHD	DCKORSJP	Hearing result for Motion for Partial Summary Judgment held on 01/25/2007 01:30 PM: Interim Hearing Held	Darla Williamson
	HRVC	DCKORSJP	Hearing result for Motion for Summary Judgment held on 02/01/2007 01:30 PM: Hearing Vacated	Darla Williamson
	HRSC	DCKORSJP	Hearing Scheduled (Motion for Summary Judgment 05/03/2007 01:30 PM)	Darla Williamson
3/1/2007	MOTN	CCCHILER	Defendant Northland Insurance Companies' Motion for Summary Judgment	Darla Williamson
	MEMO	CCCHILER	Memorandum in Support of Defendant Northland Insurance Companies' Motion for Summary Judgment	Darla Williamson
	AFFD	CCCHILER	Affidavit of Brian R Martens in Support of Motion for Summary Judgment	Darla Williamson
	AFFD	CCCHILER	Affidavit of Bryan A Nickels in Support of Defendant Northland Insurance Company's Motion for Summary Judgment	Darla Williamson
	MOTN	CCCHILER	Defendant Northland Insurance Companies' Motion for Overlength Brief and Memorandum in Support	Darla Williamson
	AFFD	CCCHILER	Affidavit of Donald J Farley in Support of Defendant Northland Insurance Company's Motion for Summary Judgment	Darla Williamson
	NOHG	CCCHILER	Notice Of Hearing (5/3/07 @ 1:30pm)	Darla Williamso

Idaho Counties Risk Management Program Underwriter vs. Northland Insurance Companies

Date	Code	User		Judge
3/5/2007	ORDR	DCOLSOMA	Order Granting Defendant Northland Insurance Companies' Motion for Overlength Brief and Memeorandum in Support	Darla Williamson
	NOTS	MCBIEHKJ	Notice Of Service	Darla Williamson
3/12/2007	NOTC	MCBIEHKJ	Notice of Hearing re: Motion for Summary Judgment (5/17/07 @ 1:30 pm)	Darla Williamson
4/4/2007	NOTS	MCBIEHKJ	Notice Of Service	Darla Williamson
4/17/2007	STIP	CCTEELAL	Stipulation Re Summary Judgment Briefing Deadlines	Darla Williamson
4/23/2007	ORDR	DCOLSOMA	Order Granting Stipulation RE: Summary Judgment Briefing Deadlines	Darla Williamson
	RSPS	CCAMESLC	Response to Motion for Summary Judgment	Darla Williamson
	AFFD	CCAMESLC	Affidavit in Opposition to Motion for Summary Judgment	Darla Williamson
5/3/2007	HRVC	DCKORSJP	Hearing result for Motion for Summary Judgment held on 05/03/2007 01:30 PM: Hearing Vacated	Darla Williamson
5/7/2007	RPLY	CCWRIGRM	Reply in Support of Defendant Northland Insurance Companies Motion for Summary Judgment	Darla Williamson
5/17/2007	INHD	DCKORSJP	Hearing result for Motion for Summary Judgment held on 05/17/2007 01:30 PM: Interim Hearing Held	Darla Williamson
5/29/2007	ORDR	DCKORSJP	Order Granting Plaintiff's Partial Motion for Summary Judgment	Darla Williamson
6/6/2007	MISC	CCCHILER	Plaintiff's Expert Witness Disclosure	Darla Williamson
6/11/2007	HRVC	DCOLSOMA	Hearing result for Jury Trial held on 12/03/2007 09:00 AM: Hearing Vacated	Darla Williamson
	CDIS	DCOLSOMA	Civil Disposition entered for: Northland Insurance Companies, Defendant; Idaho Counties Risk Management Program Underwriter, Plaintiff. order date: 6/11/2007--Defendants Motion for Summary Judgment Granted	Darla Williamson
	DEOP	DCOLSOMA	Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment	Darla Williamson
6/22/2007	JDMT	DCKORSJP	Judgment	Darla Williamson
6/25/2007	MEMO	CCWRIGRM	Northland Insurance Companies Memorandum of Costs	Darla Williamson
	AFFD	CCWRIGRM	Affidavit of Counsel	Darla Williamson
6/28/2007	OBJT	CCAMESLC	Objection to Memo of Costs	Darla Williamson
7/3/2007	APSC	CCTHIEBJ	Appealed To The Supreme Court	Darla Williamson
	RPLY	CCDWONCP	Defendant's Reply in Support of Northland Insurance Companies' Memorandum of Costs	Darla Williamson
7/16/2007	MISC	CCTOONAL	Request for Additional Documents on Appeal	Darla Williamso
	NOHG	CCBARCCR	Notice Of Hearing	Darla Williamson

Idaho Counties Risk Management Program Underwriter vs. Northland Insurance Companies

Date	Code	User		Judge
7/16/2007	HRSC	CCBARCCR	Hearing Scheduled (Hearing Scheduled 08/22/2007 02:45 PM) Def Memo of Costs	Darla Williamson
8/22/2007	HRWV	DCKORSJP	Hearing result for Hearing Scheduled held on 08/22/2007 02:45 PM: Hearing Waived Def Memo of Costs	Darla Williamson
8/23/2007	AMEN	CCCHILER	Amended Notice of Hearing	Darla Williamson
	HRSC	CCCHILER	Hearing Scheduled (Hearing Scheduled 09/12/2007 02:45 PM) Memo of Costs	Darla Williamson
9/12/2007	INHD	DCKORSJP	Hearing result for Hearing Scheduled held on 09/12/2007 02:45 PM: Interim Hearing Held Memo of Costs	Darla Williamson
9/20/2007	DEOP	DCOLSOMA	Memorandum Decision and Order on Plaintiff's Objection to Costs	Darla Williamson

Phillip J. Collaer, ISB No. 3447
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: pcollaer@ajhlaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff,

vs.

NORTHLAND INSURANCE COMPANIES, a Minnesota corporation,

Defendant.

Case No. CV OC 06 17112

COMPLAINT AND DEMAND FOR JURY TRIAL

Fee Category: A1, $88

COMES NOW, the plaintiff, Idaho Counties Risk Management Program Underwriters ("ICRMP"), by and through its attorneys of record, Anderson, Julian and Hull, and for a claim against the defendant Northland Insurance Company complains and alleges as follows:

I.

Plaintiff, ICRMP, is a joint powers entity with its principal place of business in Boise, Idaho. Plaintiff was, at all times relevant to this action, duly authorized to

conduct business relating to the sale and adjustment of insurance sold to its members within the state of Idaho.

II.

Northland Insurance Company ("Northland") is a Minnesota corporation engaged in the business of selling casualty insurance and reinsurance in the state of Idaho.

III.

Northland applied for and was issued a Certificate of Authority by the Idaho Department of Insurance authorizing Northland to transact insurance within the state of Idaho.

IV.

Northland has engaged in the business of selling insurance policies to individuals and entities such as ICRMP within the state of Idaho.

V.

All acts and events alleged herein have occurred in Ada County, state of Idaho. The amount in controversy exceed $10,000. This Court maintains jurisdiction and venue pursuant to Idaho Code §§ 1-705 and 5-404.

FACTUAL ALLEGATIONS

VI.

That ICRMP was formed in 1985 pursuant to a Joint Powers Resolution executed by various governmental entities, including Kootenai County.

VII.

That Kootenai County has been a member of ICRMP from 1985 to the present time. During that time, Kootenai County had purchased insurance policies from ICRMP. Each ICRMP policy provided comprehensive general liability and errors and omission coverage subject to certain conditions, exceptions, definitions, and limitations.

VIII.

Since its inception, and including the time the ***Paradis v. Kootenai County*** lawsuit was filed (**See** Exhibit A), ICRMP has purchased reinsurance from Northland. The reinsurance policies were purchased on an annual basis for the purpose of limiting ICRMP's financial exposure for claims covered by the ICRMP policies arising out of claims or lawsuits brought against ICRMP insureds.

IX.

That, in 2003, Kootenai County, the Kootenai County Commissioners, and former employees of Kootenai County were named as defendants in a civil lawsuit filed by Donald Paradis in the Federal District Court for the District of Idaho. **See** Exhibit A attached hereto.

X.

In accordance with the terms and conditions of the insurance policy it had purchased from ICRMP, Kootenai County, on behalf of itself and its current and former employees, notified ICRMP of the lawsuit and requested that the company

provide a defense to the litigation and indemnify the county, its current and former employees for all claims described in the ***Paradis*** Complaint.

XI.

In accordance with the terms and conditions of the reinsurance policies ICRMP had purchased, ICRMP notified Northland of the ***Paradis*** lawsuit and forwarded a copy of the Paradis Complaint to Northland at its offices in St. Paul, Minnesota.

XII.

After reviewing the ***Paradis*** Complaint, ICRMP notified its insureds that while certain conditions and exclusions within the ICRMP policy may be applicable, it appeared the allegations in the Complaint created a duty to defend the lawsuit. Kootenai County was sent a reservation of rights letter advising it of the company's position relative to coverage and reserving all rights under the insurance contract to later deny coverage and withdraw the defense. **See** Exhibit B attached hereto.

XIII.

Northland was provided copies of the reservation of rights letter (Exhibit B) identified in Paragraph XII, above.

XIV.

ICRMP retained various law firms to defend Kootenai County, as well as its current and former employees.

XV.

Throughout the Paradis litigation, ICRMP routinely communicated with Northland providing the defendant with written reports regarding the status of the

litigation, as well as the costs which were being incurred in the defense of the insureds.

XVI.

On February 13, 2006, Northland sent ICRMP a letter stating its belief that coverage for the ***Paradis*** lawsuit did not exist under the Northland reinsurance policy purchased by ICRMP. **See** Exhibit C attached hereto.

XVII.

Correspondence was exchanged between ICRMP and Northland regarding the defendant's position that coverage did not exist for the ***Paradis*** lawsuit. **See** Exhibits D and E attached hereto. Despite Northland's denial of coverage, ICRMP continued to provide regular reports advising Northland of the status of the ***Paradis*** litigation and the costs which were being incurred defending its insureds.

XVIII.

On June 27, 2006, Northland was advised by ICRMP that settlement discussions had commenced in the ***Paradis*** litigation and that a mediation was scheduled. Northland's participation in the mediation process was solicited. **See** Exhibit F attached hereto.

XIX.

On June 27, 2006, ICRMP presented a billing to Northland seeking reimbursement for defense costs which had been paid by ICRMP. At that point, the defense costs paid by ICRMP exceeded the self insured retention (SIR) provided in the

Northland policy. All defense costs or indemnity obligations exceeding the SIR were the obligation of Northland.

XX.

Northland responded to ICRMP's request for its participation in the mediation and the billing for reimbursement of defense costs by letter dated July 20, 2006. Northland refused to reimburse ICRMP for defense costs and also declined to participate in the mediation. See Exhibit G attached hereto.

XXI.

On August 8, 2006, a mediation in the ***Paradis*** case was conducted by the Honorable Larry M. Boyle. During mediation, the parties were able to reach a settlement whereby the ICRMP insureds agreed to pay $900,000 in return for a complete release and dismissal of the ***Paradis*** lawsuit with prejudice.

XXII.

The settlement described in ¶XXI, above, was memorialized in a Mutual Release, Indemnity, and Settlement Agreement ("Release Agreement"), which was signed by Mr. Paradis and the ICRMP insureds. After the Release Agreement was signed, the settlement funds were paid to Mr. Paradis and the lawsuit against the ICRMP insureds was dismissed.

FIRST CAUSE OF ACTION (BREACH OF CONTRACT)

XXIII.

Northland, by its correspondence with ICRMP, indicated its intention to breach the terms and conditions of the policies of reinsurance which had been purchased by ICRMP.

XXIV.

Northland, by its refusal to reimburse ICRMP for defense costs exceeding the SIR breached the policies of reinsurance ICRMP purchased from Northland Insurance Company.

XXV.

Northland, by its refusal to attend mediation and participate in settlement discussions breached the terms and conditions of the policies of reinsurance which ICRMP had purchased from Northland Insurance Company.

XXVI.

ICRMP has suffered damages in the form of monies it has paid in excess of the SIR, in the defense and settlement of the ***Paradis v. Kootenai County, et al*** litigation.

WHEREFORE, the plaintiff prays for judgment to be entered against the defendant in an amount which exceeds the Court's jurisdictional limits of $10,000 as will sufficiently compensate the plaintiff for its general and special damages, along with reasonable costs, prejudgment interest, attorney fees, and such other and further relief as the Court may deem just.

JURY DEMAND

Plaintiff Idaho Counties Risk Management Underwriters hereby demands a trial by jury on all issues.

DATED this 14 day of September, 2006.

ANDERSON, JULIAN & HULL, LLP

By _____
Phillip J. Collaer, Of the Firm Attorneys for Plaintiff Idaho Counties Risk Management Underwriters

EXHIBIT A

WILLIAM L. MAUK (ISB # 1825)
MAUK & BURGOYNE
515 South Sixth Street
Post Office Box 1743
Boise, Idaho 83701-1743
Telephone: (208) 345-2654
Facsimile: (208) 345-3319

Attorneys for Plaintiff

FEE PAID
R# 73819

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

DONALD M. PARADIS,

Plaintiff,

vs.

WILLIAM J. BRADY, individually and in his official capacity; KOOTENAI COUNTY, a political subdivision of the State of Idaho; GLEN E. WALKER, individually and in his capacity as the former Kootenai County Prosecutor; D. MARC HAWS; PETER C. ERBLAND; GEORGE ELLIOTT, individually and in their capacities as agents of Kootenai County; and DOES A through D, fictitiously-named persons,

Defendants.

CASE NO.

CIV03-150-N-EJL

COMES NOW the Plaintiff, above named, and for causes of action against the Defendants, states, avers and alleges as follows:

1. This is a civil action to redress various torts and the deprivation of civil rights brought under the constitutions and laws of the United States and the State of Idaho, as herein more particularly described.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked and secured pursuant to 28 U.S.C. Section 1331, affording federal question jurisdiction, 28 U.S.C. Section 1332, affording diversity jurisdiction, and 28 U.S.C. Section 1343, affording jurisdiction for violations of civil rights.

3. Because there is a common nucleus of operative facts affecting Plaintiff's state and federal claims, this Court has pendent jurisdiction over the state claims pursuant to 28 U.S.C. Section 1367.

4. Venue is properly set in the District of Idaho in that almost all of the acts and omissions which form the basis of this Complaint occurred in Idaho, Plaintiff is a citizen and resident of Ada County, Idaho, the Defendant, Kootenai County is a governmental subdivision of the State of Idaho, and all other Defendants, except one, are citizens and residents of this state.

PARTIES

5. Plaintiff Donald M. Paradis ("Paradis") resides in Boise, Ada County, Idaho and is a citizen of the State of Idaho. For over twenty years, from June 23, 1980 until April 10, 2001 he was incarcerated in various jails and prisons, including the Kootenai County jail and in the Idaho State Correctional Institution at Boise, Idaho.

6. Defendant Kootenai County (the "County") is, and at all times pertinent hereto was, a political and governmental subdivision of the State of Idaho, and included among its governmental agencies the offices of the Prosecuting Attorney of Kootenai County and the Sheriff of Kootenai County.

7. Defendant William J. Brady ("Dr. Brady") is, and at all times pertinent hereto was, a citizen and resident of the State of Oregon. Although at various times pertinent to this action, Dr. Brady was employed by the State of Oregon as its Chief Medical Examiner, all of his conduct which forms the basis of this action was performed either as a private citizen or as the employee and agent of Kootenai County.

8. Defendant Glen E. Walker ("Walker") is, and at all times pertinent hereto was, a citizen and resident of Kootenai County. At times most pertinent to this action, Walker was the elected Prosecuting Attorney of Kootenai County and the chief policy and decision-maker affecting the investigation and prosecution of criminal cases by the County.

9. Defendant D. Marc Haws ("Haws") is, and for most of the time pertinent hereto was, a citizen and resident of the State of Idaho, formerly residing in Kootenai County and currently residing in Ada County. At times most pertinent to this action, Haws was employed as the Chief Deputy Prosecuting Attorney of Kootenai County.

10. Defendant Peter C. Erbland ("Erbland") is, and at all times pertinent hereto was, a citizen and resident of the State of Idaho, residing in Kootenai County. At times most pertinent to this action, Erbland was employed as a Deputy Prosecuting Attorney for Kootenai County.

11. Defendant George Elliott is, and at all times pertinent hereto was, a citizen and resident of the State of Idaho, residing in Kootenai County. At times most pertinent to this action, Elliott was employed as a detective with the Kootenai County Sheriff's Department.

12. With respect to the state torts alleged herein, Defendants Walker, Haws, Erbland, Elliott and Dr. Brady are sued as the agents of Kootenai County, insofar as their conduct was within the course and scope of their employments and agencies. For the purpose of Plaintiff's claims for violations of civil rights under color of state law, and for the purpose of state tort

claims where their conduct was in excess or outside of the authorities of their agencies, these Defendants are sued in their individual capacities.

13. Defendants, DOES A through D, are fictitiously-named persons or entities, whose true identities are presently unknown to Plaintiff, but each of whom is responsible, in whole or part, for the wrongful conduct alleged herein. Plaintiff reserves the right to amend this Complaint, as further information becomes available, to properly identify the true names of such Defendants and the specific acts and omissions giving rise to their liability.

14. Certain facts alleged herein, attributable to employees and agents of Kootenai County, are imputed to and the legal responsibility of the County by virtue of the principles of agency, the doctrine of *respondeat superior* and state statutes and case law authorizing such imputation of responsibility.

15. To the degree the acts and omissions of any putative agent and employee of Kootenai County were outside of the scope and responsibility of his or her agency or employment, such persons are sued in their individual capacities and are intended to be included among the fictitiously named Defendants.

16. Prior to commencement of this action, on October 9, 2001, Plaintiff served a Notice of Tort Claim on the duly authorized agents of Kootenai County, in compliance with Chapter 9, Title 6, Idaho Code.

17. To the extent this suit alleges violation of Plaintiff's civil rights, he seeks redress from this Court and an assessment of liability and damages against those Defendants who deprived him of his civil rights, pursuant to 42 U.S.C., Sections 1983 and 1985.

CONTEXTUAL HISTORY

18. In 1980 and 1981, Donald M. Paradis was wrongfully accused, prosecuted and convicted in the State of Idaho of the first degree murder of Kimberly Ann Palmer ("Palmer") and sentenced to death.

19. His arrest, incarceration, prosecution and conviction were the product of a conspiracy among the Defendants, resulting in the repeated presentation of perjured testimony against him and, for fifteen years, the deliberate, malicious and chronic hiding of evidence of his innocence from him, his attorneys, the jury that convicted him and numerous courts and judges.

20. In January 1996, Paradis and his attorneys discovered the existence of handwritten notes made by the attorney who prosecuted his case, Haws, (herein the "Haws Notes") revealing evidence and information which contradicted and impeached the testimony and opinions expressed at trial by the prosecution's key witness, Dr. Brady, and which was in direct conflict with the prosecution's claim that Palmer was killed in Idaho and died after aspirating water from a shallow creek where her body was found.

21. In May 1996, the Idaho Board of Pardons and Paroles held a clemency hearing on Plaintiff's case during which Thomas Gibson ("Gibson") publicly confessed that he alone killed Palmer in Spokane, Washington, and that Paradis was neither an accomplice nor even present.

22. Shortly thereafter, the Governor of Idaho commuted Paradis' sentence from death to life imprisonment without the possibility of parole.

23. While in prison, Paradis filed and pursued numerous appeals and post-conviction relief and habeas corpus petitions, largely without success. However, in 1997 he was granted an evidentiary hearing on the exculpatory Haws Notes. *Paradis v. Arave*, 130 F.3d 385 (9th Cir. 1997). In 1999, at that hearing, the contradictions between the Haws Notes and Dr. Brady's trial

testimony were fully exposed, and on March 14, 2000 U.S. District Judge Edward J. Lodge found that Plaintiff's constitutional right to a fair trial had been violated and set aside his conviction. *Paradis v. Arave*, 20 F.3d 950 (9th Cir. 2001).

24. On April 10, 2001, Bill Douglas, the current Kootenai County Prosecuting Attorney, dismissed all homicide charges against Paradis and he was set free, having spent over 20 years in jail or prison, 15 years on death row.

25. By this action, Paradis seeks to vindicate the gross injustices committed against him by the Defendants, and to obtain some measure of monetary relief for the loss of his freedom and the permanent impairment of his capacity to lead any semblance of a normal life.

FACTUAL SUMMARY

26. During the early morning of June 21, 1980, Palmer and a friend, Scott Currier ("Currier"), were brutally murdered at a residence on Dearborne Street in Spokane, Washington.

27. The following day, the bodies of Palmer and Currier were discovered in a steep, overgrown ravine, off Mellick Road near Post Falls, Idaho. Currier's severely beaten body was found in a sleeping bag on the incline of the ravine. Palmer's body was found face down, partly in a shallow creek at the bottom of the ravine.

28. That night, the bodies of the two victims were driven to Portland, Oregon by two criminal investigators from the Kootenai County Sheriff's Department, Defendant George Elliott ("Elliott") and Wesley Krueger ("Krueger"), arriving at the offices of forensic pathologist William J. Brady about 9:30 a.m. the next morning, where the Kootenai County Prosecutor's Office had arranged for Dr. Brady to perform autopsies on Palmer and Currier.

29. Ruth Jones, who lived at the entrance to Mellick Road, informed the police that early the morning of June 22 she had observed a van drive up the road and, twenty to thirty

minutes later, three men walked past her house coming from the area where the bodies and turned-over van were later found.

30. That same morning a police officer who knew nothing of the homicides, stopped and briefly questioned Paradis, Gibson and Larry Evans ("Evans") as they waited for a ride outside a convenience store in Post Falls, Idaho.

31. After the bodies of Palmer and Currier were discovered, on June 23, 1980, Paradis and two others, Charles Amacher ("Amacher") and Roseanne Moline, were arrested by Spokane law enforcement authorities on suspicion of having committed the homicides. Several days later Gibson was also arrested in California and extradited to Spokane. Evans was also sought by Washington authorities but evaded law enforcement until 1986.

32. The autopsies of Currier and Palmer took the better part of the day of June 23 and, except for brief periods, were attended by Elliott and Krueger. During the medical examinations Elliott listened to Dr. Brady dictate his thoughts and observations as he proceeded through the autopsies. He also asked multiple questions of the pathologist regarding his findings and opinions and took notes.

33. In these exchanges, Elliott learned several things which were key to his investigation and fundamental to the issue of whether Idaho authorities had any jurisdiction over the homicides, including (a) that in Brady's expert opinion Palmer died from manual strangulation, and not from drowning, (b) that there was no evidence of sexual molestation, (c) that Palmer had a one and one-half inch cut on her labia that did not bleed, meaning it was inflicted a significant time after her death, (d) that Palmer's body revealed several other post-mortem abrasions and wounds, and (e) that despite pointed inquiry from Elliott, the pathologist

could not venture an opinion on the place or time of death, and would not say Palmer was killed in Idaho.

34. Elliott and Krueger departed with this information and drove back to Spokane. The next morning Elliott presented a report of the autopsy findings to a meeting of Kootenai County and Spokane County law enforcement personnel in Spokane, attended by Haws (herein the "task force meeting").

35. The notes which Haws took of Elliott's June 24, 1980 report included the following references: (a) "no time of death either," (b) "VF (female victim) strangled," (c) "voice box broken 2 parts," (d) "dead when went in water," and (e) "not sexually assaulted." In depositions and hearing testimony acquired years later, Elliott confirmed these representations as coming from Dr. Brady and the pathologist acknowledged them as accurate reflections of his June 23, 1980 autopsy findings and conclusions.

36. At the June 24 meeting and in other subsequent exchanges among law enforcement personnel involved in the case, Haws and Elliott learned there was substantial physical and witness evidence connecting both homicides to the Dearborne Street residence in Spokane, and no direct evidence whatsoever connecting either homicide to Idaho.

37. The post-mortem cut on Palmer's labia identified by Dr. Brady's autopsy was extremely significant. Although it occurred in a highly vascular area of the body, Dr. Brady noted in his autopsy report that there was "no vital reaction," explaining that the wound simply did not bleed.

38. To a forensic pathologist of Dr. Brady's considerable experience, the clinical findings indicated conclusively that the labia wound had to have been inflicted more than a half hour after Palmer's heart stopped beating. As the judges of the Ninth Circuit correctly observed

years later, "[s]ince Paradis, Gibson and Evans were at the Mellick Road site for only about 30 minutes, Palmer's death would have to antedate the entire episode there...," and "[a] death at Mellick Road,...would appear to become severely implausible in the light of (Dr. Brady's) own [] finding."

39. On June 24, 1980, Paradis, Gibson and Amacher were charged by authorities in Spokane County, Washington, with the murders of both Currier and Palmer; however, shortly thereafter a strategic decision was made to proceed only on the Currier case, leaving prosecution of the Palmer homicide in abeyance.

40. In early September 1980, a Washington jury returned verdicts of not guilty against Paradis, Gibson and Amacher on the Currier homicide. Haws attended portions of the trial, even attempting to sit at the table of the prosecution's counsel, and took extensive notes.

41. Only after these acquittals, on September 24, 1980, did Kootenai County seek arrest warrants for Paradis and Gibson on Palmer's homicide. Plaintiff's first appearance before an Idaho court on this charge was November 26, 1980.

42. A few months after Paradis was formally charged, his first public defender withdrew because of a potential conflict. At that point the handling district judge appointed William Brown ("Brown"), an attorney who had only been practicing law for six months and had never conducted any jury trial in a civil or criminal case. Unbeknownst to Paradis until years after his conviction, Brown also worked weekends as a reserve police officer in Coeur d'Alene.

43. Throughout the proceedings leading to the trial of Paradis and Gibson in Idaho, Walker, Haws, Erbland and Elliott made numerous representations to judges and the media about the ostensible facts of the case, and about the strength and certainty of such facts, which representations were in direct conflict with the exculpatory evidence obtained from Dr. Brady at

the autopsy, and in many instances patently false and fabricated. These representations included the following:

a) At the four-day preliminary hearings of Paradis and Gibson in December 1980, the prosecution hypothesized that Palmer was killed at Mellick Road in Idaho, offering tangential, circumstantial and remotely inferential evidence about the relative locations where the Currier and Palmer bodies had been found, but holding secret from the court and defense counsel the forensic evidence from Dr. Brady demonstrating that Palmer died elsewhere;

b) At a bail hearing for Paradis in April 1981, Haws told the court that there was "water in Palmer's lungs caused by her last instinctive gulp as she lay face down in the creek," an opinion never previously expressed by Dr. Brady or anyone and, again, the prosecution withheld from the court and defense counsel the contrary forensic evidence;

c) In opposing Plaintiff's motion to dismiss based on the absence of probable cause to believe Palmer died in Idaho, Haws misrepresented the post-mortem wound to Palmer's labia as "a superficial cut" in "her groin" area which, without a shred of evidentiary support, he described as consistent with a cut from a barb wire fence as Palmer ran down the Mellick Road ravine fleeing from Paradis, Gibson and Evans; and

d) Also opposing dismissal for lack of jurisdiction, Haws informed the Idaho court that Dr. Brady had testified in Washington that Currier had been dead longer than Palmer, but omitted informing anyone that this testimony could be impeached by what Dr. Brady told Elliott contemporaneous to the autopsy.

44. As Paradis and Gibson awaited trial, Gibson had a note delivered to the Idaho district court judge handling the case informing him that Palmer was killed in Spokane, implying

he had caused or contributed to her death and that Paradis was not present and did not participate.

45. Because of this, the Gibson and Paradis trials were bifurcated.

46. As the separate trials approached, it was abundantly clear to the Kootenai County prosecutors that they had a fundamental hole in their proof; namely, the absence of any persuasive evidence that Palmer was killed in Idaho and, thus, an inability to link Paradis to anything more than having helped to hide her body.

47. In June 1981, Dr. Brady traveled to Coeur d'Alene, Idaho and, according to him, met and talked with Haws for the first time to prepare his testimony for the Gibson and Paradis trials.

48. During their conversations, Haws probed Dr. Brady: (a) on the prosecutor's theory that Palmer had inhaled water into her lungs, thus connecting her killing to the creek where her body was found, and (b) on the absence of bleeding from the labia cut, which contradicted that theory. On these key points, Haws promoted and suborned Dr. Brady's adoption of opinions that would get the cases against Gibson and Paradis over the obvious jurisdictional hurdle, connecting Palmer's death to Idaho.

49. Again, Haws took notes of portions of the pretrial exchange with Dr. Brady which, when these notes were revealed 15 years later, reflect considerable hesitancy by Brady on committing to Haws' aspiration of water theory. At most, Dr. Brady ventured the uncertain observation that water "may have played a role" in Palmer's death. The notes further highlighted the exculpatory import of the post-mortem labia wound, with Haws raising the obvious question of whether there was blood in Palmer's jeans in the area proximate to the genital wound, and marking the question prominently with a star, the only such emphasis in the Haws Notes.

50. Hours later, Dr. Brady took the stand at the Gibson trial and, with a clarity that is in striking contrast to what the pathologist had just told Haws and to the Haws Notes, offered sworn testimony embracing the prosecutor's aspiration of water theory, stating:

> "I think she inhaled water, exactly, that's what I think happened," and "I think there is a very strong likelihood that she was alive when she went in the water and inhaled some water, that is my opinion."

51. On the complex question of the absence of bleeding from the labia wound, Dr. Brady admitted, upon inquiry, that there was no bleeding or crusting indicated from physical examination of the wound and "simply no blood on (the) genital area of Palmer." Nonetheless, he dismissed the significance of these finding with a hypothetical recitation he and others of his profession know to be scientifically false, stating:

> "If the area was submerged in water, then the blood would have washed away, wouldn't be there, look exactly like I saw it."

52. Plaintiff's defense counsel, Brown, sat through portions of the Gibson trial and later read the transcript of Dr. Brady's testimony, never knowing of the self-contradicting statements the pathologist had made to Elliott at the autopsy and to Haws right before taking the witness stand.

53. Although Gibson testified that Palmer was killed in Spokane and described his complicity, Gibson was convicted of killing Palmer in Idaho, largely on the strength of Dr. Brady's new found opinions.

54. Six months later, in December 1981, Dr. Brady again testified, this time against Paradis. In his sworn comments, the theory of Palmer inhaling water through her crushed throat became more than a hypothesis; indeed, it was central to the questions from Haws and the opinions expressed by his increasingly partisan expert.

55. Almost parroting Haws' description to judges months before on the probable cause inquiry, Dr. Brady testified, "the aspiration of water played a role, if not the terminal event, in that girl's death after she was strangled." His concluding comment to the jury was:

> "Kimberly Ann Palmer, I believe was strangled. I believe she was strangled and shortly afterwards aspirated some amount of water during her terminal, during the last moments with her last breath, I think she inhaled some water."

56. The labia wound was deliberately omitted from the examination of Dr. Brady by Paradis' woefully inexperienced defense counsel because, as he testified later, he feared it would raise the specter of sexual abuse. In discovery, defense counsel had received Elliott's type-written investigation report stating Palmer had been sexually molested, but Plaintiff's counsel never knew what Dr. Brady had told Elliott at the autopsy, which Elliott had repeated to Haws, or that in his notes from the task force meeting Haws wrote "not sexually assaulted."

57. Relying directly and repeatedly on the well coached, embellished, exaggerated and false testimony of Dr. Brady, Haws argued his case against Paradis to the jury and secured Plaintiff's conviction.

58. In 1987, after his apprehension, Evans was also tried by Kootenai County and acquitted.

59. Years later, comparing the Haws Notes to Dr. Brady's numerous testimonies at trials, at habeas corpus evidentiary hearings and in depositions, the Ninth Circuit concluded: (a) that Dr. Brady held too many contradictory opinions to have confidence in the Paradis verdict, (b) that the circumstantial evidence on which Paradis' conviction relied "is undermined" by the Haws Notes, and (c) that quite probably "no reasonable juror could find from the medical evidence (now) available in the record that Palmer was alive when her body entered the creek at Mellick Road."

60. On remand, following an extensive evidentiary hearing, the U.S. District Court in Idaho ultimately agreed, holding that in procuring his conviction and death sentence, Paradis' constitutional rights had been violated. *Paradis v. Arave*, 2000 WL 307458 (D. Idaho 3/14/00)

INCORPORATION

61. Plaintiff realleges and incorporates paragraphs 1 through 60 above, as part of each of the counts, claims and causes of action stated below.

COUNT ONE

(Civil Rights—Kootenai County and Walker)

62. In 1963, in the case of *Brady v. Maryland*, 373 U.S. 83 (1963) ("*Brady*"), the United States Supreme Court imposed an affirmative constitutional duty on prosecutors at every level of government throughout the United States to disclose exculpatory evidence known by the prosecution team to criminal defendants and their attorneys.

63. By 1980 and 1981, when Paradis became the subject of criminal investigation and then prosecution by Kootenai County, *Brady* and a progeny of judicial decisions which followed reflected a clearly established constitutional right entitling Paradis to be informed by Kootenai County prosecutors, and law enforcement personnel assisting on their behalf, of all information they were aware of which was in any way favorable to his defense and material to his possible innocence of the murder charge against him (herein the "*Brady* doctrine").

64. At the times of the Currier and Palmer homicide investigations, Plaintiff's arrest, and continuing through the prosecution of Paradis without interruption, Kootenai County officials, particularly the Kootenai County Prosecuting Attorney, Walker, and the Kootenai County Sheriff, knew or had to have known to a moral certainty that deputy prosecutors handling criminal cases in Kootenai County—and the police, detectives and deputies who they relied

upon—would be confronted repeatedly with circumstances where they became aware of information (tangible, documentary, testimonial or otherwise), that was potentially exculpatory of a criminal defendant's guilt, potentially impeaching of evidence or testimony supporting conviction, in direct and potential conflict with the prosecution's theory or explanation of the crime, or tending to undermine the prosecution's case and exonerate the defendant of culpability.

65. Under these circumstances, these same Kootenai County officials, particularly Walker, appreciated that prosecutorial and law enforcement personnel would often be required to make difficult choices regarding full and prompt disclosure of potentially exculpatory or impeaching information to defendants and their attorneys, and that hesitance, evasiveness or failure on the part of these employees to make a choice entirely consistent with their lawful duties and responsibilities would likely cause a deprivation of constitutional rights to criminal defendants, presumed by law to be innocent.

66. Walker and other Kootenai County policy-makers further appreciated that through proper and focused training, supervision and discipline of Kootenai County prosecutors and law enforcement personnel, the choices these employees would be required to make regarding exculpatory evidence would be less difficult to make and, when made correctly, would ensure the preservation of a defendant's constitutional guaranties and mitigate the prospect of convicting defendants for crimes they did not commit.

67. Kootenai County officials, particularly Walker, were made even more acutely aware of these circumstances as they might affected Paradis, given their knowledge that when Haws assumed responsibility for prosecuting the case against the Plaintiff he had only been practicing law around eight months and had never before tried any homicide case, let alone a capital murder case.

68. Despite the requirements of the *Brady* doctrine and the known implications of such requirements affecting the rights of criminal defendants and the duties and activities of law enforcement personnel, in 1980 and 1981—and, indeed, continuing for years thereafter—the customs, policies and practices of Kootenai County, particularly those of its Prosecuting Attorney and Sheriff, displayed and reflected a deliberate indifference to and conscious disregard for the constitutional rights of criminal defendants generally, and the Plaintiff in particular.

69. By choice, neglect or reckless indifference, Walker and others responsible for establishing, promoting and enforcing the policies of Kootenai County affecting prosecutors and law enforcement personnel, either:

a) made it the practice, or caused it to be the rule and practice, of Kootenai County prosecutors and police to evade or ignore their constitutional duties of disclosure and defendants' rights under the *Brady* doctrine; and/or

b) failed or refused to adequately and properly train and instruct Kootenai County prosecutors and police on the implications of the *Brady* doctrine in lawfully carrying out their employment activities and responsibilities; and/or

c) failed or refused to adequately supervise Kootenai County prosecutors and police in fulfillment of their constitutional obligations under the *Brady* doctrine; and/or

d) failed or refused to promptly and appropriately discipline Kootenai County prosecutors and police who neglected, evaded or violated the constitutional rights criminal defendants, particularly those guaranteed by the *Brady* doctrine.

70. As the direct and proximate result of the foregoing, there existed a climate and policy of deliberate indifference to the constitutional rights of the Plaintiff, affecting the conduct of Walker, Haws, Erbland, Elliott and others, causing them to:

a) intentionally and repeatedly disregard their duties of disclosure under the *Brady* doctrine;

b) hide and deliberately obscure evidence which directly or indirectly exonerated Paradis;

c) manipulate, encourage and conspire with Dr. Brady to give false, exaggerated and unsupportable testimony; and,

d) mislead the Paradis jury, other prosecutor, defense counsel and numerous trial and appellate judges, by representing as fact or informed opinion numerous, critical matters which all of some of them knew to be contrary to established or provable fact.

71. These acts and omissions violated Plaintiff's rights under the Fourth, Sixth and Fourteenth Amendments, and comparable provisions of the Idaho Constitution, and caused him to suffer substantial injury, loss and damage, as more specifically alleged herein.

COUNT TWO

(Civil Rights—Kootenai County and Walker)

72. Plaintiff hereby realleges and incorporates paragraphs 62 through 71 below, as part of the following Count.

73. At the time Paradis was arrested and charged by Kootenai County, he had a clearly established constitutional right not to be seized and deprived of his liberty, and not to be held and prosecuted, absent probable cause, founded upon demonstrable facts, supporting a reasonable conclusion that he had committed a crime within the jurisdiction of the prosecutorial authorities and courts of Idaho.

74. In 1980 and 1981, Kootenai County officials, particularly the Kootenai County Prosecuting Attorney, Walker, and the Kootenai County Sheriff, knew or had to have known to a moral certainty:

a) that, in their investigation of crimes and pursuit of suspects, deputy prosecutors, police, detectives and deputies would be confronted repeatedly with circumstances where evidence of probable cause was lacking;

b) that these same personnel would be required to make difficult choices regarding whether to arrest, charge or prosecute where, despite their suspicions, evidence of probable cause was lacking;

c) that if these same personnel acted precipitously and without justification, or acted on the apparent authority of a court's probable cause determinations, obtained on false or incomplete premises, it would violate the constitutional rights of those improperly accused; and,

d) that through proper and focused training, supervision and discipline, the choices these personnel would be required to make on probable cause considerations would be less difficult to make and, when made correctly and legally, would ensure the preservation of constitutional guarantics and mitigate the prospect of arresting, restraining and prosecuting the wrong people for crimes they did not commit.

75. Despite the requirement that County prosecutors, police, detectives and deputies conform their official conduct to comply with the rights guaranteed by the United States and Idaho constitutions, in 1980 and 1981, the customs, policies and practices of Kootenai County, particularly those of its Prosecuting Attorney and Sheriff, displayed and reflected a deliberate

indifference to and conscious disregard for the constitutional rights of criminal suspects, including the Plaintiff.

76. By choice, neglect or reckless indifference, Walker and others responsible for establishing, promoting and enforcing the policies of Kootenai County affecting prosecutors and law enforcement personnel, either:

a) made it the practice, or caused it to be the rule and practice, of Kootenai County prosecutors and police to arrest, charge and prosecute criminal suspects without probable cause; and/or

b) failed or refused to adequately and properly train and instruct Kootenai County prosecutors and police on the implications of obtaining judicial probable determinations based on misrepresented or incomplete information; and/or

c) failed or refused to adequately supervise Kootenai County prosecutors and police in fulfillment of their constitutional obligations concerning probable cause determinations; and/or

d) failed or refused to promptly and appropriately discipline Kootenai County prosecutors and police who neglected, evaded or violated the constitutional rights of criminal suspects on probable cause determinations.

77. As the direct and proximate result of the foregoing, there existed a climate and policy of deliberate indifference to the constitutional rights of the Plaintiff, affecting the conduct of Walker, Haws, Erbland, Elliott and others, and causing them to:

a) arrest, charge and prosecute Paradis without probable cause and knowing there was inadequate evidence to afford Idaho criminal jurisdiction over him;

b) hide and deliberately obscure evidence which directly or indirectly exonerated Paradis and undermined any reasonable probable cause determination; and,

c) mislead judges required to make probable cause determinations in this case by representing as fact or informed opinion numerous, critical matters which all or some of them knew to be contrary to established or provable fact or, at the very least, were contradicted by other undisclosed facts.

78. These acts and omissions violated Plaintiff's rights under the United States Constitution, including the Fourth, Sixth and Fourteenth Amendments, and comparable provisions of the Idaho Constitution, and caused Paradis to suffer, and continue to suffer, substantial injury, loss and damage, as more specifically alleged herein.

COUNTS FOUR, FIVE AND SIX

(Neligence, False Arrest, Malicious Prosecution and False Imprisonment—Kootenai County and Its Agents)

79. By virtue of the Idaho Tort Claims Act, Chapter 9, Title 6, Idaho Code, every political subdivision of the State of Idaho, including Kootenai County, has waived its sovereign immunity for certain tort actions against it, including for claims of negligence, misrepresentation, deceit, defamation, false arrest, false imprisonment and malicious prosecution.

80. Such waiver of immunity extends to claims against the individual employees and agents of political subdivisions, including Kootenai County and the Kootenai County Prosecutor, for the negligent or other wrongful acts and omissions of those employees and agents while acting in the course and scope of their employment or agency duties.

81. Much of the conduct of Walker, Haws, Erbland, Elliott and Brady, alleged herein, constituted acts and omissions within the purview of the Idaho Tort Claims Act, for which they and Kootenai County each have liability to Paradis for money damages.

82. Acting on behalf of Kootenai County, Walker, Haws, Erbland and Elliott, or some of them, instigated, pursued and prosecuted first degree murder charges against Paradis knowing that (a) there was an absence of evidence supporting probable cause to believe the death of Palmer occurred in Idaho, (b) there was insufficient evidence to give Idaho courts jurisdiction over the subject matter of the criminal action and (c) there was evidence, being intentionally concealed, that undermined probable cause, jurisdiction and Plaintiff's culpability.

83. Although warrants were sought and obtained by these Defendants for the arrest, detention, restraint and incarceration of Paradis, such warrants were not the product of independent objective findings by a magistrate, but were invalid, having been unlawfully obtained by deceit, through the intentional, deliberate and malicious withholding of material, exculpatory evidence by the Defendants and through the presentation of information which was either knowingly false or fraught with a reckless disregard for the truth and accuracy of such information.

84. At the time of the Plaintiff's preliminary hearing, and subsequently at the Idaho district court judge's reconsideration of the magistrate's probable cause determination on Plaintiff's motion to dismiss, there was a further intentional, deliberate and malicious withholding of material evidence by these Defendants and a representation of information and arguments ostensibly supporting probable cause which was completely without factual support.

85. In prosecuting the first degree murder charge against Paradis, Haws intentionally concealed or recklessly withheld evidence which was exculpatory and impeaching and either suborned the perjurous testimony of Dr. Brady or deliberately elected not to report such perjury to the Court when it obviously occurred.

86. By these acts and omissions, Walker, Haws, Erbland, Elliott and Brady, or some of them, knowingly and intentionally violated Idaho Code, Sections 18-2901 and 18-2902, which make false imprisonment a criminal offense; Idaho Code, Sections 18-5408, 5409 and 5411, which make perjury and the subornation of perjury criminal offenses, and Idaho Code, Section 18-5414, which make it a crime to give false information to any court.

87. When, years later, Magistrate Craig Kosonen, who had handled the preliminary hearing on Paradis, learned about the evidence which the prosecution had withheld, he expressed his dismay publicly, indicating that had he been fully informed of what the prosecution knew but concealed, it is unlikely he would have found probable cause and bound Paradis over on the murder charge.

88. On a claim of negligence against Walker and all others who were responsible for the policies, practices, training and supervision affecting Kootenai County prosecutors and law enforcement personnel, Plaintiff hereby realleges and incorporates the allegations of Counts One and Two, above.

89. As the direct and proximate cause of Defendants' deceit and negligence, and the false arrest, false imprisonment and malicious prosecution of Paradis, Plaintiff has suffered substantial injury loss and damage, as more specifically alleged hereinbelow.

COUNT SIX

(Civil Rights – Brady, Elliott and Haws)

90. Knowing they did not possess, and could not lawfully obtain, evidence which provided proof beyond a reasonable doubt that Don Paradis murdered Kimberly Palmer, and that he committed this alleged crime in Idaho, Haws, Elliott and Dr. Brady, and perhaps Walker and Erbland, entered into a plan, design and conspiracy to concoct evidence against Paradis and

present it as if fact, all in violation of rights protected by the laws of the United States, the Fourth, Sixth and Fourteenth Amendments of the United States Constitution, and comparable provisions of the Idaho Constitution.

91. The theory that Palmer aspirated water was an idea contrived by Elliot, adapted and embellished by Haws and promoted to and adopted by Dr. Brady, who then transposed the theory into his ostensibly informed opinion testimony for purpose for the Gibson and Paradis trials.

92. When this conspiracy arose and was first acted upon, Haws and Elliott were performing purely investigatory functions which preceded the arrest and decision to prosecute Paradis. Nonetheless, these Defendants were acting under color of state law.

93. When Dr. Brady joined this extra-judicial conspiracy, to give false testimony, he was the contract agent of Kootenai County and, as such, he too was acting under color of state law; indeed, by jointly engaging and acting in concert with state officials in the deprivation of Plaintiff's civil rights, Dr. Brady lost any pretense of acting simply as a private person.

94. The acts, conduct and omissions of these Defendants was extreme, outrageous, willful and malicious. In their over-zealousness to assign legal blame for a horrible, senseless crime, they abandoned every vestige of responsibility and authority, perpetrating a fraud and securing the contrived conviction of the Plaintiff.

95. But for the role each of these Defendants contributed to the plan and conspiracy, Paradis would have never been arrested or charged, and most certainly would not have been prosecuted or convicted.

96. As the proximate result of these wrongful and illegal acts, Plaintiff has suffered, and continues to suffer, substantial injury, loss and damage, as more specifically alleged herein.

COUNT SEVEN

(Tort Claims – Brady)

97. Plaintiff hereby realleges and incorporates paragraphs 80 through 96 above as if set forth in full below.

98. If in committing the conduct alleged in Count Six, Dr. Brady was acting purely as a private person, his conduct was at the very least negligent and amounted to an intentional inflection of emotional distress upon Paradis.

99. Dr. Brady knew the import of his role in the criminal action pursued against Paradis and assumed a duty and responsibility to provide objective, truthful and complete information to every participant in the criminal process at every formal and informed stage of the judicial proceedings.

100. He miserably breached this duty, abandoned every pretense of independence and assumed the mantel and role of an advocate, stretching the truth to the breaking point, devising and promoting theories that violated established precepts and standards of his profession and ignoring the findings and scientific principles of forensic pathology.

101. His conduct was extreme, outrageous, malicious and deliberate, with the purpose and effect of obtaining a conviction that he appreciated could not be obtained without his complicit excesses.

102. Dr. Brady, perhaps more than any other single Defendant, caused Don Paradis to relinquish his freedom for over 20 years, to suffer the severe emotional pain of having his execution scheduled three times and to permanently lose his ability to participate in a free society as a normal human being, all to Plaintiff's substantial loss, injury and damage, as more specifically alleged hereinbelow.

COUNT EIGHT

(Defamation – Brady)

103. Throughout the numerous and various challenges to Plaintiff's conviction, Dr. Brady made repeated public statements to a variety of news media outlets, describing the forensic evidence which ostensibly supported the conviction of Paradis.

104. He made and volunteered these statements with no privilege or obligation to do so.

105. Repeatedly, the statements he made were knowingly false, perpetuated the contrived and unsupportable theories discussed herein, and always cast both the Plaintiff and his claims of innocence in a false light.

106. One of Dr. Brady's most notable, defamatory versions of truth occurred on a news story about the case produced by Northwest Reports out of Portland, Oregon.

107. In that story, well after the prosecution and conviction of Paradis had become the subject of public scrutiny and Dr. Brady's role in that process had become suspect, he publicly announced for the first time that he had taken samples of Palmer's lung tissue during her autopsy and, since the trial, had examined them under a microscope, revealing the presence of contaminants, specifically plankton, that he opined confirmed the aspiration of creek water into Palmer's lungs.

108. According to Dr. Brady, he made photographs of the microscopic views and both showed and gave them to Erbland in 1987, with the expectation they could be used in the trial against Evans and perhaps in opposing Paradis' first habeas corpus petition.

109. No one involved in the Paradis case, including Erbland or those from the Idaho Attorney General's office who fought Paradis' post-conviction petitions, acknowledges any of this occurring or will corroborate Dr. Brady's public statements in any way.

110. Other specific instances of Dr. Brady's defamation of Paradis, we believe, will be revealed and supported by discovery in this case, and Plaintiff reserves leave to amend this Complaint as such information becomes available.

111. By this course of defamatory conduct, Dr. Brady continued to cast a false cloud of uncertainty over Plaintiff's claims of innocence and provided cover for his own transgressions at the continued expense and punishment of Paradis.

COUNTS NINE, TEN AND ELEVEN

(Negligence/Intentional Infliction of Emotional Distress/Defamation—Haws)

112. In 1986, Paradis was granted an evidentiary hearing on his first habeas corpus petition and, in preparation for that hearing, subpoenaed Haws and his files from the 1980-81 prosecution which, unbeknownst to Paradis and his attorneys at the time, include the Haws Notes.

113. At the time Haws was living in Salt Lake City, Utah, was no longer employed as a prosecutor and was working for a private company.

114. On November 26, 1986, anticipating where the hearing might lead, Haws wrote Erbland, who was still with the Kootenai County Prosecutor's Office, asking him to personally find and send Haws a copy of all of his file notes, particularly requesting the notes of the June 24, 1980 task force meeting where Elliott first described Dr. Brady's autopsy findings.

115. Haws' review of his prior notes undoubtedly refreshed his recollection, if not confirmed his memory, that the file notes contained exculpatory evidence and information

traceable to Dr. Brady, which impeached the pathologist's trial testimony, which undermined the theory of jurisdictional proof argued by Haws to the court and jury, and which were never revealed to Paradis or his defense counsel, prior to, during or since Plaintiff's criminal trial.

116. Appreciating how the revelation of these file notes in a habeas corpus proceedings would likely have caused Plaintiff's conviction to be set aside, Haws not only continued to hide the information, but promoted and assisted suppression of the notes through a motion to quash the subpoena, successfully made by Lynn Thomas, the Idaho Deputy Attorney General then handling the state's case.

117. No longer cloaked with the disclosure dilemmas or immunities of a prosecutorial advocate, Haws clearly recognized that his notes held the key to freedom for Paradis, and knew or should have appreciated that he had the responsibility of at least an ordinary and prudent citizen to disclose the exculpatory notes to Thomas, the federal court, Paradis and his counsel.

118. In breach of that duty, Haws made a negligent, if not deliberate choice, of continued secrecy, with reckless and willful disregard for the consequences to Paradis and with the outrageous and malicious intent of perpetuating the profound deprivation of Plaintiff's freedom, thereby inflicting severe emotional distress upon Paradis.

119. Had Haws elected and pursued the right and prudent choice of disclosing his exculpatory notes and the evidence they reflect, it is likely Paradis would have been saved the punishment of 14 more years in prison, including nine years on death row.

120. Throughout his involvement in the Paradis and Gibson cases, both when serving as a prosecutor and after, Haws made repeated public and extra-judicial statements to a variety of news media outlets.

121. He made and volunteered these statements to influence public opinion and enhance his own statute and self-image, without any cloak of prosecutorial immunity and with no privilege or obligation to do so.

122. Repeatedly, it is believed and thus alleged, he made statements that were knowingly false or made with reckless disregard for the truth, which perpetuated his contrived and unsupportable theories as discussed herein, and which consistently cast both Plaintiff and his claims of innocence in a false light.

123. Plaintiff believes that discovery in this case will further reveal the details and specifics instances of Haws' defamation of Paradis, and leave is reserved to amend this Complaint when such information becomes available.

124. As the direct and proximate result of the foregoing tortuous conduct, Plaintiff has suffered, and continues to suffer, loss, injury and damage, as more particularly described hereinbelow.

DAMAGES, COSTS AND FEES

125. The following paragraphs are hereby incorporated as to each and every count, claim and cause of action stated herein.

126. As a result of the wrongs described herein, Paradis lost every valuable possession he owned. Normal life, as that phrase has meaning to free citizens in this country, stopped for Don Paradis on June 23, 1980. For over 20 years he was deprived of the ability to earn income, build a profitable career, acquire a home, marry, have children, accumulate assets, acquire the education, skill and work experience essential to economic growth and security and achieve almost everything by which civilized societies typically measure material success.

126. Since his release from incarceration, Paradis has had very little success obtaining and holding jobs. He is without the skills necessary to participate in a modern workforce. Despite the judicial invalidation of his conviction, the notoriety of his case and the label of being an ex-convict haunt him at every turn. He has never obtained, and probably will never secure, employment which provides much more than a subsistence income. Having failed to contribute income withholdings for two decades, he is currently ineligible for any form of Social Security benefits. Although now over the age of 54, the prospects of retirement are virtually non-existent for Donald Paradis.

127. Plaintiff has sustained, and will in the future sustain, economic losses well in excess of the jurisdictional threshold for this Court.

128. Plaintiff has further sustained, and will in the future sustain, pain, suffering, grief, mental anguish, loss of identity and other non-economic damages well in excess of the jurisdictional threshold for this Court.

129. By reason of the matters described herein, Plaintiff has been compelled to obtain legal counsel both to secure his freedom from unlawful imprisonment and to prosecute this action, and has incurred, and continues to incur, enormous legal fees and costs that are both an economic damage caused by the Defendants' wrongdoing and an expense of this litigation.

130. Plaintiff is entitled to an award of his fees and costs in the successful resolution of this action, pursuant to 42 U.S.C. Section 1981, and every other provision of state and federal law affording such awards.

131. The conduct attributable to the Defendants herein was an extreme deviation from acceptable standards, committed with malice and reckless disregard for the likely consequences, by reason of which, Plaintiff reserves leave to hereafter amend this Complaint, pursuant to Idaho

Code, Section 6-1604 to add a prayer for punitive damages on each Count, claim and cause of action and against each Defendant.

WHEREFORE, Plaintiff prays for relief as follows:

A. For economic damages in a sum not less than $5,000,000;

B. For non-economic damages in a sum not less than $15,000,000;

C. For prejudgment interest on all damages pursuant to 42 U.S.C. Section 1983 and every other provision of federal and state law providing for such relief.

D. For award of his reasonable attorney fees and expenses; and

E. For all other relief, legal and equitable, appropriate to this action.

DATED this 9th day of April, 2003.

MAUK & BURGOYNE

William L. Mauk, of the Firm
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff requests a jury trial on all claims and causes triable by jury, pursuant to Rule 38, Federal Rules of Civil Procedure.

EXHIBIT B

ICRMP ...more than just insurance

LYNNETTE L. MCHENRY, J.D.
CLAIMS MANAGER

COPY

June 30, 2003

Kootenai County
Erika Ellingson
501 Government Way
Coeur d'Alene, ID 83816

RE: CLAIM NUMBER: 2001019301
INSURED: Kootenai County
CLAIMANT: Donald Paradis
DOL: 04/10/2001

Dear Ms. Ellingson:

This will acknowledge receipt of the Complaint filed by Donald M. Paradis against Kootenai County and its current and former employees, Glenn Walker, D. Marc Haws, Peter Erbland, and George Elliott, filed in the United States District Court for the District of Idaho under case number CIV-03-150-S-LMB.

In reviewing the allegations of the Complaint, it is noted that the actions which give rise to this controversy surround Mr. Paradis' arrest and conviction in 1980 and 1981. According to the Complaint, Kootenai County employees Haws, Erbland and Elliott withheld exculpatory evidence, and conspired with forensic pathologist Dr. William Brady to present false testimony and evidence to a local magistrate during the preliminary hearing, and, ultimately, to the jury, resulting in his conviction. According to the Complaint, these actions violated Mr. Paradis' constitutional rights and were undertaken in direct contravention of the United States Supreme Court's rulings in ***Brady v. Maryland***, 373 U.S. 83 (1963). According to the Complaint, the Kootenai County Prosecuting Attorney and the Sheriff displayed and reflected a deliberate indifference and conscious disregard to the Plaintiff's constitutional rights. Further, the Complaint alleges that, in 1996, handwritten notes authored by Deputy Prosecuting Attorney Marc Haws were discovered which contained exculpatory evidence which could have been utilized at the criminal trial to impeach the testimony of Dr. Brady. According to the Complaint, this information would have materially altered the outcome of the criminal case. The Complaint alleges Kootenai County failed to adequately supervise or train its employees, and, by doing so, demonstrated a deliberate indifference to the Plaintiff's constitutional rights secured by the ***Brady v. Maryland*** decision. The Complaint further contends that Kootenai County employees Haws,

Erbland, and Elliott continued their conspiracy with Dr. William Brady to defeat Plaintiff's efforts to obtain post-conviction relief. It is alleged the actions of the County and its employees were intentional, deliberate, malicious, and negligent.

According to the Complaint, the alleged wrongful conduct of the County and its employees was fully exposed through an evidentiary hearing before Federal Judge Edward J. Lodge. Through those proceedings, on March 14, 2000, Judge Lodge found that Mr. Paradis' constitutional rights to a fair trial had been violated, and, for that reason, his conviction was set aside. Judge Lodge's ruling was appealed to the Ninth Circuit Court of Appeals, and affirmed on March 5, 2001. ***See Paradis v. Arave***, 240 F.3d 1169 (9th Cir. 2001). Thereafter, on April 10, 2001, the Kootenai County Prosecuting Attorney dismissed all homicide charges and Mr. Paradis was released. Thereafter, on October 9, 2001, a notice of tort claim was filed alleging various violations of state and federal law. The present Complaint was filed April 9, 2003.

I direct your attention to the definitions, coverage, and exclusions sections of the 2001 ICRMP policy, where, at § II, Comprehensive General Liability and Law Enforcement Liability coverage is provided. The policy reads:

> COVERAGE A. **Comprehensive General Liability.** We agree, subject to the terms and conditions of this Coverage, to pay on your behalf those sums which you become legally obligated to pay as damages for ***personal injury*** or ***property damage*** which arise out of an ***occurrence*** during the Policy Period.
>
> ....
>
> COVERAGE C. **Law Enforcement Liability.** We agree, subject to the terms and conditions of this Coverage, to pay on your behalf all sums which you become obligated to pay by reason of errors, omissions, or negligent acts arising out of the performance of your duties while providing law enforcement services or the administration of ***first aid*** resulting in ***personal injury*** or ***property damage*** during the Policy Period.

The policy defines controlling terms as follows:

> 1. **"Accident"** means an unexpected happening without intention or design.
>
> ....
>
> 8. **"Occurrence"** means an ***accident*** or a continuous or repeated exposure to conditions which

result in ***personal injury*** or ***property damage*** during the Policy Period. All personal injuries to one or more persons and/or ***property damage*** arising out of an ***accident*** or a continuous or repeated exposure to conditions shall be deemed one ***occurrence***.

The policy also identifies certain exclusions, which are applicable to this claim as follows:

> Liability Coverage under the Comprehensive General Liability Insuring Agreements does not apply:
>
> ....
>
> 2. To ***personal injury*** or ***property damage*** resulting from an act or omission intended or expected from the standpoint of any ***insured*** to cause ***personal injury*** or ***property damage*** . This exclusion applies even if the ***personal injury*** or ***property damage*** is of a different kind or degree, or is sustained by a different person or property, than that intended or expected. This exclusion shall not apply to ***personal injury*** resulting from the use of reasonable force to protect persons or property, or in the performance of a duty of the ***insured***.
>
> 3. To ***personal injury*** or ***property damage*** resulting from an act or omission outside the course and scope of employment and any act performed with malice or criminal intent. This exclusion applies regardless of whether any ***insured*** is actually charged with, or convicted of, a crime.

The ICRMP policy also provides errors and omissions coverage at § IV of the policy. The insuring agreement reads:

> COVERAGE A. We agree, subject to the terms and conditions of this Coverage, to pay on your behalf all sums which you shall become legally obligated to pay as ***damages*** because of any ***claim*** which is ***first made*** against you during the Policy Period, arising out of any ***wrongful act*** by you.

The relevant definitions to E & O coverage read:

> The following definitions are applicable to the Errors and Omissions Insuring Agreement of this Policy:
>
> 1. **"Bodily Injury"** means physical injury to any person, including death, and any mental anguish or mental suffering associated with or arising from such physical injury.
>
> 2. **"Claim"** means a demand received by you for money damages alleging a ***wrongful act*** by you. No ***claim*** exists where the only monetary damages sought or demanded are costs of suit and/or attorney's fees.
>
> 3. **"Damages"** means compensation awarded by judgment or through settlement; and costs, charges and expenses incurred in the pursuit or defense of a ***claim***, if ordered by the court or agreed to through settlement.
>
> 4. **"First Made"** means the earlier of the following times:
>
>   a. When you first give written notice to us that a ***claim*** has been made against you; or

b. When you first give written notice to us of specific circumstances involving a particular person or entity which may result in a ***claim***. Reports of incidents or circumstances made by you to us as part of risk management or loss control services, shall not be considered notice of a ***claim***.

5. **"Property Damage"** means physical damage to or destruction of tangible property, including loss of use.

6. **"Wrongful Act"** means the negligent performance of or failure to perform a legal duty or responsibility arising out of public office or position.

The E & O Coverage also provides certain exclusions, which read:

> The Errors and Omissions Insuring Agreement does not cover any ***claim***:
>
> ....
>
> 2. Arising out of any dishonest, fraudulent, criminal, malicious, deliberate or intended wrongful act committed by you or at your direction.
>
> 3. Resulting from an act or omission outside the course and scope of employment.
>
> 4. For ***bodily injury*** or ***property damage***, as defined in this Section.
>
> 5. Resulting from a ***wrongful act*** intended or expected from the standpoint of any ***insured*** to cause ***damages***. This exclusion applies even if the

damages claimed are of a different kind or degree than that intended or expected.

....

11. Resulting from a continuing ***wrongful act*** which commences prior to the retroactive date set forth in the Declarations of this Policy.

12. Arising out of law enforcement activities or the performance of law enforcement duties.

The Plaintiff, by his Complaint, has alleged willful and intentional conduct on the part of both Kootenai County and its employees. We recognize the Complaint also alleges the County and its employees were negligent. As referenced above, the ICRMP policy specifically excludes coverage for any intentional, malicious conduct, or acts taken outside the course and scope of an insured's employment, which cause bodily injury or property damage. Additionally, the ICRMP policy specifically excludes coverage under the Errors and Omissions section for any claims seeking recovery for bodily injuries or law enforcement activities. The E & O section also excludes coverage for acts which commence prior to the retroactive date, which is identified in the policy declarations as November 29, 1985. Finally, from the Complaint, it appears the Plaintiff may seek punitive damages, which are excluded under the ICRMP policy.

Because the Complaint does include allegations of negligence, which could potentially describe a covered claim under the Comprehensive General Liability Insuring Agreements, ICRMP will, in accordance with the terms and conditions of its policy, defend Kootenai County and its current and former employees, Glenn Walker, Marc Haws, Peter Erbland, and George Elliott. By extending a defense, ICRMP does not waive, and reserves all rights under the terms and conditions of the insurance policy, and specifically reserves its right to deny any obligation to indemnify Kootenai County, Glenn Walker, Marc Haws, Peter Erbland, or George Elliott for any claims which are currently pled, and which do not describe a covered claim under the terms and conditions of the ICRMP policy. Additionally, ICRMP does not waive its right to withdraw its defense of Kootenai County, Haws, Erbland, and Elliott, should it be determined that coverage under the ICRMP policy does not exist for the claims set forth in the Complaint.

If you have any questions concerning the above, and our position with respect to ICRMP's duty to defend or indemnify Kootenai County, and its former and current employees, please advise.

Sincerely,

Lynnette L. McHenry

Lynnette L. McHenry, J.D.
Claims Manager

cc: John Goedde, Agent
John Nichols, AMS
Chris Wotton, Lloyds
Randy Robinson, Northland
Richard D. Ferguson, Director

EXHIBIT C

Northland
INSURANCE

385 Washington Street
Mail Code 103N
St. Paul, MN 55102

February 13, 2006

CERTIFIED MAIL

Ms. Lynnette McHenry
Claim Manager
Idaho Counties Risk Management Program
3100 Vista Avenue, Suite 300
Boise, ID 83705

Re:		
	Our Insured:	ICRMP/Kootenai County
	Plaintiff:	Don Paradis
	Our Claim Number:	23,AA101263-44
	Date of Loss:	June 23, 1980
	Claim made:	October 9, 2001

Dear Ms. McHenry:

This letter acknowledges receipt of the amended Complaint in the matter of **Don Paradis v. Kootenai County**, filed in United States District Court for the District of Idaho, Case No. CIV03-150 on April 9, 2003.

This matter was referred to Northfield Insurance Company for consideration under Policies AA101127 and AA101263. The policies provide various excess coverages to I.C.R.M.P. as follows:

> Policy No. AA101127 provides comprehensive general liability coverage, on an occurrence basis, with a policy period of December 31, 1994 to December 31, 1995.
>
> Policy No. AA101263 provides errors and omissions coverage, on a claims-made basis, with a policy period of October 1, 2000 to October 1, 2001, and a retroactive date of November 29, 1985.
>
> Both coverages are subject to a self insured retention of $150,000.

That facts and important dates are as follows;

- June 23, 1980, Don Paradis was arrested and incarcerated on a charge of murder.
- 1981, Paradis was convicted of murder and sentenced to death.
- 1996 his sentence was commuted to life imprisonment following claims that investigators and prosecutors withheld exculpatory evidence.
- April 10, 2001, following appeals, the court commuted Paradis sentence and released him from prison.
- October 9, 2001, Paradis filed a Notice of Claim against Kootenai County.

- April 9, 2003, Paradis filed suit against Kootenai County prosecutors and deputies for false arrest, malicious prosecution, false imprisonment, and withholding exculpatory evidence in violation of his civil rights of due process and unreasonable arrest and seizure.

I draw your attention to the **ALL LINES AGGREGATE INSURANCE POLICY (PE-OCC JAN. 94)**, which states:

GENERAL INSURING AGREEMENTS

. . .

SECTION II – COMPREHENSIVE GENERAL LIABILITY

INSURING AGREEMENTS

A – COMPREHENSIVE GENERAL LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnity the Assured for all sums, including expenses, all as more fully defined by the term ultimate net loss, which the Assured shall become legally obligated to pay as damages imposed by law because of bodily injury, property damage, personal injury, advertising injury, products liability and or completed operations, host/liquor liability or incidental malpractice which result from an occurrence and which occur during the policy period. . . .

C – LAW ENFORCEMENT LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of errors, omissions or negligent acts arising out of the performance of the Assured's duties while acting as a law enforcement official or officer in the regular course of public employment as hereinafter defined, arising out of any occurrence from any cause on account of Personal Injury, Bodily Injury, Property Damage, Violation of Civil Rights or First Aid, happening during the period of this insurance. . .

EXCLUSIONS APPLICABLE TO SECTION II

THIS SECTION DOES NOT APPLY – to any claim, whether direct or consequential, or for any cause of action which is covered under any other Section of this policy or

A. to personal injury or property damage which the Assured intended or expected or reasonably could have expected. . .

Please refer to the **ALL LINES AGGREGATE INSURANCE POLICY** for

the definition of "occurrence."

It is our position there is no coverage for any injuries or damages claimed by Don Paradis under **SECTION II, COVERAGE A - COMPREHENSIVE GENERAL LIABILITY** or **COVERAGE C - LAW ENFORCEMENT LIABILITY** of the **ALL LINES AGGREGATE INSURANCE POLICY,** because the injuries or damages:

- Did not arise from an occurrence during the period of this insurance; or
- Were expected or intended from the standpoint of Kootenai County or their employees.

Next, please direct your attention to **SECTION IV – ERRORS AND OMISSIONS**, of the **ALL LINES AGGREGATE INSURANCE POLICY,** which states:

INSURING AGREEMENT

> If during the Policy Period, any Claim is first made against the Assured for a Wrongful Act, Underwriters will indemnify the Assured, for all Loss incurred by the Assured by reason of any Wrongful Act . . .

Please refer to Endorsement No. 14, which states:

> Effective date of this endorsement is October 1, 2000. Endorsement No. 14. . .
>
> Section IV retroactive dates
>
> Kootenai County – November 29, 1985 for the first $1,000,000 any one claim, December 31, 1994 for the next $1,000,000 any one claim and October 1, 2000 for the remaining $4,000,000 any one claim. . . .

I next refer you to **EXCLUSIONS APPLICABLE TO SECTION IV**, which states:

> THIS SECTION SHALL NOT APPLY – to any Claim for damages, whether direct or consequential or for any cause of action which is covered under any other Section of this policy or to any Claim . . .
>
> B. brought about or contributed to by fraud, dishonesty or criminal act of any Assured: . . .
>
> G. resulting from an occurrence which commences prior to the Retroactive Date set out in Declaration 4 of November 29, 1985
>
> H. for bodily injury or property damage;

l. arising out of law enforcement activities; . . .

Please refer to the **ALL LINES AGGREGATE INSURANCE POLICY** for the definitions of "claim first made" and "wrongful act."

It is our position that there is no coverage for Kootenai County under **SECTION IV – ERRORS AND OMISSIONS** of the **ALL LINES AGGREGATE INSURANCE POLICY**, for any injuries or damages claimed by Don Paradis because:

- the claim was not first made against the Assured during the policy period of October 1, 2000, to October 1, 2001; or
- the claim was brought about by fraud, dishonesty or criminal acts; or
- the claim resulted from an occurrence that commenced in 1980 and 1981, prior to the retroactive date of November 29, 1985; or
- the claim arose out of bodily injury; or
- the claim arose out of law enforcement activities.

Because there is no coverage for Kootenai County under the **ALL LINES AGGREGATE INSURANCE POLICY**, Northfield Insurance Company is unable to consider indemnification of I.C.R.M.P. for any damages awarded or sums incurred in the defense of Kootenai County in this lawsuit.

Should you have any questions regarding this matter or wish to discuss this matter further, please contact me at 651-310-4427.

Sincerely,

Erik Martensen
Technical Specialist
Northfield Insurance

MAP/cah/0284

EXHIBIT D

ICRMP ...more than just insurance

LYNNETTE L. MCHENRY
ASSOCIATE GENERAL COUNSEL
& CLAIMS MANAGER

March 2, 2003

Erik Martensen
Technical Specialist, Specialty Claims
Northfield Insurance Company
385 Washington Street
Mail Code 103 N
St. Paul, MN 55109-1309

RE: CLAIM NUMBER: 2001019301
INSURED: Kootenai County
CLAIMANT: Donald Paradis
DOL: 1985-2001

Dear Mr. Martensen:

We have received your letter dated February 13, 2006 regarding the above-entitled matter. In your correspondence, Northland Insurance Company is taking the position that, due to various exclusions and conditions within the ICRMP and Northland policies, that coverage does not exist in the ***Paradis*** litigation for Kootenai County and any of that entity's present and former employees. I must advise you that I believe your position is mistaken and should be reconsidered.

As background, I am enclosing for your file, a copy of the reservation of rights letter which ICRMP provided to Kootenai County on November 5, 2003 when this case was first filed. As you can see from the reservation of rights letter, ICRMP took the position that many of the claims in the ***Paradis*** Complaint were not entitled to coverage for various reasons, including the intentional tort exclusions you have cited as well as the operation of the retroactive date. However, as noted in the reservation of rights letter, the ***Paradis*** Complaint is not limited to intentional torts. Instead, the Complaint alleges the acts of Kootenai County and its employees were negligent.

IDAHO COUNTIES RISK MANAGEMENT PROGRAM, UNDERWRITERS ◆ 3100 VISTA AVENUE, SUITE 300 ◆ BOISE, IDAHO 83705 ◆ P.O. BOX 15249 ◆ BOISE, IDAHO 83715
PHONE (208) 336-3100 ◆ FAX (208) 336-2100

According to Mr. Paradis, this negligence caused his false imprisonment and resultant emotional distress associated with over twenty years of imprisonment.

ICRMP took the position that, while it was questionable that a duty to indemnify would arise, a duty to defend did exist since the torts of false imprisonment and infliction of emotional distress are continuing torts. Because of this, the torts were ongoing when Kootenai first became an ICRMP insured in 1985 and continued until Paradis was released from prison in April of 2001. It is important to note that, from 1985 until Mr. Paradis was released in 2001, Kootenai County was, at all times, an ICRMP insured.

In Idaho, an insurer's duty to defend is a separate and much broader duty than its obligation to indemnify. **See** ***Kootenai Co. v. Western Caualty & Sur. Co.***, 113 Idaho 908, 750 P.2d 87 (1988). The Idaho Supreme Court has consistently ruled that the duty to defend arises upon the filing of a Complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy. **See** ***Amco Ins. Co. v. Tri-Spur Inv. Co.***, 140 Idaho 733, 101 P.3d 226 (2004), ***Hoyle v. Utica Mut. Ins. Co.***, 137 Idaho 367, 48 P.3d 1256 (2002); ***Const. Mgmt. Sys., Inc. v. Assurance Co. of Am.,*** 135 Idaho 680, 23 P.3d 142 (2001). Mindful of this standard, ICRMP reviewed the ***Paradis*** complaint and, considering the allegations of negligence and the existence of a continuing tort, came to the conclusion that the complaint, read broadly, described a claim which was potentially entitled to coverage under the ICRMP policy. For that reason, ICRMP has defended this case under a reservation of rights.

ICRMP's treatment of the negligence and emotional distress claims as continuing torts must also be considered in light of the District Court rulings in the ***Paradis*** matter resolving various motions to dismiss. In his September 29, 2004 Memorandum Decision and Order, the Honorable B. Lynn Winmill, Chief Judge for the United States District Court for the District of Idaho, concluded that various state law claims, including emotional distress and false imprisonment were not entitled to dismissal under the statute of limitations as those claims constituted continuing torts which did not accrue until Mr. Paradis was released from prison. In light of this ruling, it is apparent that ICRMP correctly assessed its duty to defend in this case and has acted appropriately. This ruling also demonstrates that your decision to deny coverage under the Comprehensive General Liability Insuring Agreement is erroneous. False imprisonment and emotional distress caused by alleged negligent acts describe claims which are potentially entitled to coverage under the ICRMP policy. The retroactive date does not bar coverage for these claims as they did not accrue until April of 2001. Accordingly, I would ask that you reassess your position and withdraw your February 13, 2006 denial of coverage.

I look forward to your prompt response.

Sincerely,

Lynnette L. McHenry
Associate General Counsel
& Claims Manager

cc: Richard D. Ferguson, Director

EXHIBIT E

Northland INSURANCE

385 Washington Street
Mail Code 103N
St. Paul, MN 55102

March 15, 2006 **CERTIFIED MAIL**

Ms. Lynnette McHenry
Claim Manager
Idaho Counties Risk Management Program
3100 Vista Avenue, Suite 300
Boise, ID 83705

Re:		
	Our Insured:	ICRMP/Kootenai County
	Plaintiff:	Don Paradis
	Our Claim Number:	23,AA101263-44
	Date of Loss:	June 23, 1980
	Claim made:	October 9, 2001

Dear Ms. McHenry:

I am in receipt of and thank you for your letter of March 2, 2003, in which you outline your position that Northfield Insurance owes indemnification for the Paradis litigation. As you requested, we have reconsidered our position regarding coverage.

That facts and important dates are as follows:

- On June 23, 1980, Don Paradis was arrested and incarcerated on a charge of murder.
- In 1981, Paradis was convicted of murder and sentenced to death.
- In 1996, his sentence was commuted to life imprisonment following claims that investigators and prosecutors withheld exculpatory evidence.
- On April 10, 2001, following appeals, the court commuted Paradis sentence and released him from prison.
- On October 9, 2001, Paradis filed a Notice of Claim against Kootenai County.
- On April 9, 2003, Paradis filed suit against Kootenai County prosecutors and deputies for false arrest, malicious prosecution, false imprisonment, and withholding exculpatory evidence in violation of his civil rights of due process and unreasonable arrest and seizure.

We are aware of the decision by Honorable B. Lynn Winmill, Chief Judge for the United States District Court for the district of Idaho, for which the Judge ruled that Mr. Paridis' claims constituted a continuing tort and were not barred by statute of limitation defenses.

Insurance law is governed by state insurance contract law, not federal law. The statute of limitations principles do not guide determination of when a tort or an occurrence takes place for insurance coverage purposes.

It is the cause of the loss and not the resulting injury that determines the incidence of liability under the policy. Northfield Insurance is only liable under an occurrence policy for an event or

accident which occurred during the policy period. Northfield Insurance is not liable for claims arising out of an event or accident which occurred prior to the effective date of the insurance coverage, even though damages and claims continued to accrue from this cause during the later period of coverage. *Applachian Ins. Co. v. Liberty Mut. Ins. Corp.*, 507 F. Supp. 59 (D.C. Pa. 1981).

Neither the federal civil rights claims nor the state law claims under Idaho law would constitute an occurrence during the policy period. Please direct your attention to *Kootenai County v. Western Casualty & Surety Co.*, 113 Idaho 908, 914-15, 750 P.2d 87, 93-94 (1988). A county sheriff, acting upon a writ of execution, conducted a sale of property, but failed to comply with the statutory notice requirements, subjecting him to civil penalties payable to the aggrieved party. Following the six month redemption period, the sheriff issued the deed for the property to the purchasers, as required by statute. However, during this redemption period, Kootenai County secured an occurrence policy from Lloyd's and made a claim for coverage under the policy, asserting that the delivery of the deed, in conjunction with the earlier improper sale, constituted a single integrated occurrence. The Idaho Supreme Court rejected this argument, noting that the only wrongful act and occurrence was the improperly conducted sale. The court stated:

> The improper execution of the sale is not an event covered by the Lloyd's policy since it occurred almost six months prior to the effective date of the policy. An insurer is not liable for claims arising out of an event or accident which occurred prior to the effective date of the insurance coverage, even though damages and claims continue to accrue from this cause during the later period of coverage.

Similarly, in *City of Erie, Pa.* v. Guaranty Nat. Ins. Co., 109 F.3d 156 (3rd Cir. 1997), the court concluded that a claim of malicious prosecution occurred when the underlying criminal charges were filed, for purposes of determining insurance coverage, and not at the later time that the action was ultimately favorably terminated to the benefit of the claimant.

After further evaluation, we have determined that our position regarding coverage, as outlined in our February 13, 2006 letter, remains unchanged. Also should you wish to further discuss this matter, please contact me at 651-310-4427 (direct dial line).

Sincerely,

Erik Martin

Erik Martensen
Technical Specialist
Northfield Insurance

MAP/cah/0284

EXHIBIT F

ICRMP ...more than just insurance

LYNNETTE L. MCHENRY
ASSOCIATE GENERAL COUNSEL
& CLAIMS MANAGER

June 27, 2006

Erik Martensen
Technical Specialist
Northland Insurance
385 Washington Street
Mail Code 103N
St. Paul, MN 55102

Re: Paradis v. Kootenai County
ICRMP Claim No. 2001028381
Northland Claim No. 23,AA101263-44

Dear Erik:

As you are aware, ICRMP has throughout this litigation provided a defense to its insureds, Kootenai County, Mark Haws, George Elliott, and Peter Erbland in the above-referenced litigation. The defense has been extended under a reservation of rights. Throughout the litigation, ICRMP has provided Northland with regular reports detailing the status of the litigation and the defense costs which were being incurred.

Under the reinsurance policy purchased from Northland, ICRMP maintained a $150,000.00 self insured retention (SIR). The SIR included defense costs. To date, the defense costs incurred in the *Paradis* litigation total $423,305.33. Because the SIR has been exhausted, Northland's obligation to reimburse ICRMP for defense costs exceeding the SIR has now arisen. Accordingly, I am enclosing an interim billing for reimbursement of the litigation costs paid by ICRMP through June 23, 2006.

Please be advised that pursuant to the Court's ruling on the Motions for Summary Judgment filed on behalf of the insureds, all claims against Peter Erbland have been dismissed. Additionally, many of the claims against Kootenai County, George Elliott, and Mark Haws were dismissed. However, because the Court retained some of the causes of action against the County, Mr. Elliott and Mr. Haws, the litigation is ongoing. Trial is scheduled for October of 2006 and is expected to last an entire month.

Due to the exhaustion of the SIR, Northland's obligation to reimburse ICRMP for defense costs will continue through trial. Additionally, should the case proceed to trial, Northland will be obligated to indemnify ICRMP for any adverse verdict entered against Kootenai County, Mr. Elliott, or Mr. Haws finding them liable for a covered claim.

IDAHO COUNTIES RISK MANAGEMENT PROGRAM, UNDERWRITERS ◆ 3100 VISTA AVENUE, SUITE 300 ◆ BOISE, IDAHO 83705 ◆ P.O. BOX 15249 ◆ BOISE, IDAHO 83715
PHONE (208) 336-3100 ◆ FAX (208) 336-2100

In light of the foregoing, ICRMP is inviting Northland to participate in discussions surrounding the litigation strategy and potential settlement of the litigation. Considering the litigation costs we will continue to incur, it is prudent at this time to discuss the merits of seeking a mediated or negotiated settlement.

Additionally, a decision needs to be made concerning whether ICRMP and Northland will seek reimbursement from the insureds for litigation costs relating to the defense of clearly non-covered claims. As you are aware, ICRMP has defended the entire lawsuit, despite the fact there are claims which are not entitled to coverage. ICRMP was required to proceed in this fashion due to the well-established principle that where a Complaint describes a potentially covered claim, the duty to defend extends to the entire Complaint, including the excluded claims. See ***Primrose Operating Company v. National American Insurance Company,*** 382 F3d. 546 (5th Cir. 2004); ***United Services Automobile Association v. Morris***, 154 Arizona 113, 741 P2d. (1987). A growing numbers of courts have recognized the inequity of this requirement and have recognized the insurer's right to seek reimbursement from its insured for defense costs relating to clearly excluded claims.

Due to the fact the SIR has been exhausted, I invite Northland's input and comment concerning whether the insured should be notified that the company intends to seek reimbursement for the defense costs described above. Additionally, in an effort to protect Northland's rights in this case, I welcome your comments concerning future defense strategy, including mediation or settlement discussions.

I look forward to your prompt response.

Sincerely,

Lynnette L. McHenry
Associate General Counsel
& Claims Manager

LLM:jsm

Cc: Richard Ferguson, Executive Director

IDAHO COUNTIES RISK MANAGEMENT PROGRAM
3100 Vista Avenue, Ste 300
PO Box 15116
Boise, ID 83715
208-246-8216
208-246-8200 (fax)

INTERIM
REINSURANCE BILLING STATEMENT

Date: June 23, 2006

Reinsurer: Erik Martensen
Technical Specialist
Northland Insurance
385 Washington Street
Mail Code 103N
St. Paul, MN 55102

Adjuster: Lynnette L. McHenry
Associate General Counsel &
Claims Manager

Claim #s: 2001028381
2001022516
2001019301
2001022524

Claimant: Donald Paradis
Insured: KOOTENAI COUNTY

Total Paid:	$ 423,305.33
Less: SIR:	($150,000.00)
Less: Deductible:	($ 5,000.00)
Less: Other:	--
AMOUNT DUE:	**$268,305.33**

Please send your check to the Attention of ***ICRMP Accounting Department.***
Thank you.

Cc: ICRMP Accounting Dept.

EXHIBIT G

Northland INSURANCE
P.O. Box 64805
St. Paul, MN 55164

July 20, 2006

CERTIFIED MAIL

ICRMP
Lynette McHenry, Claim Manager
3100 Vista Avenue, Suite 300
Boise, ID 83705

Re:	Insured Member:	Kootenai County
	Plaintiff:	Donald Paradis
	Claim Number:	23AA101263-44
	Occurrence/Arrest Date:	June 23, 1980

Dear Ms. McHenry:

I am in receipt of and thank you for your letter dated June 27, 2006 for which you cite case law supporting your position and submit an interim reimbursement request to Northfield Insurance Company.

We have reviewed this matter, including the case law you cited. Our coverage position, as outlined in our letter dated March 15, 2006, remains unchanged. I must therefore respectfully deny your request for reimbursement.

Northfield Insurance Company acknowledges that ICRMP has invited us to be involved in the defense along with ICRMP, and to participate in the voluntary mediation. Because there is no coverage, we have no obligation to indemnify ICRMP and we therefore decline the opportunities extended.

If you would like to further discuss this matter, please contact me at (651) 310-4427 (direct line).

Sincerely,

Erik Martensen

Erik Martensen, AIC
Technical Specialist
Northfield Insurance Company
Tel: (800) 328-5972, Ext. 04427
Fax: (866) 842-9181

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant Northland Insurance Companies, properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

I DAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff, vs. NORTHLAND INSURANCE COMPANIES, Defendant.	Case No. CV OC 0617112 **ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL** **(Jury Trial Demanded)**

COMES NOW defendant, Northland Insurance Companies, incorrectly identified in plaintiff Idaho Counties Risk Management Program Underwriters' Complaint and Demand for Jury Trial ("Complaint"), and whose proper name and identity herein is Northfield Insurance Company ("Northfield"), by and through its counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., in answer to such Complaint on file herein, answers, alleges, and states as follows:

FIRST DEFENSE

Each and every allegation of the plaintiff's Complaint fails to state a claim for relief against defendant Northfield.

SECOND DEFENSE

I.

Each and every allegation contained in plaintiff's Complaint, and each and every cause of action, is denied unless specifically admitted in this defense.

II.

With respect to paragraph II of plaintiff's Complaint, defendant Northfield admits only that it is a corporation engaged in the business of selling insurance in the State of Idaho.

III.

With respect to paragraphs III and IV of plaintiff's Complaint, defendant Northfield admits that at all relevant times, it had a Certificate of Authority issued by the Idaho Department of Insurance authorizing Northfield to transact the business of insurance in the State of Idaho, and has engaged in the business of selling insurance policies within the State of Idaho.

IV.

With respect to paragraph IX of plaintiff's Complaint, defendant Northfield admits that in April, 2003, Kootenai County and certain employees or former employees of Kootenai County were named as defendants in a civil lawsuit filed by Donald Paradis in the United States District Court for the District of Idaho.

V.

With respect to paragraph XI of plaintiff's Complaint, defendant Northfield admits that plaintiff notified Northfield of the *Paradis* lawsuit and Northfield received a copy of the *Paradis* Complaint.

VI.

With respect to paragraph XIII of plaintiff's Complaint, defendant Northfield admits only that, on or about March 6, 2006, it received a copy of an unsigned letter dated June 30, 2003, from Lynette McHenry to Erika Ellingson regarding Idaho Counties Risk Management Program's defense of Kootenai County.

VII.

With respect to paragraph XVI of plaintiff's Complaint, defendant Northfield admits only that Erik Martensen addressed correspondence to Lynnette McHenry by letter dated February 13, 2006; defendant Northfield further states that the document identified as Exhibit C to plaintiff's Complaint speaks for itself.

VIII.

With respect to paragraph XVII of plaintiff's Complaint, defendant Northfield admits only that Lynnette McHenry addressed correspondence to Erik Martensen by letter dated March 2, 2003 (which was a typographical error and apparently intended to be dated March 2, 2006), and that Erik Martensen addressed correspondence to Lynnette McHenry by letter dated March 15, 2006; defendant Northfield further states that the documents identified as Exhibit D & E to plaintiff's Complaint speak for themselves

IX.

With respect to paragraphs XVIII and XIX of plaintiff's Complaint, defendant Northfield admits only that that Lynnette McHenry addressed correspondence to Erik Martensen by letter dated June 27, 2006; defendant Northfield further states that the document identified as Exhibit F to plaintiff's Complaint speaks for itself.

X.

With respect to paragraph XX of plaintiff's Complaint, defendant Northfield admits only that Erik Martensen addressed correspondence to Lynette McHenry by letter dated July 20, 2006; defendant Northfield further states that the document identified as Exhibit G to plaintiff's Complaint speaks for itself.

THIRD DEFENSE

Plaintiff's claim is barred under the doctrines of laches, waiver, unclean hands, and/or estoppel under the circumstances asserted in the Complaint.

FOURTH DEFENSE

Plaintiff has failed to mitigate its damages, if any.

FIFTH DEFENSE

Plaintiff has not complied with all conditions precedent to bringing this action or to make a claim for benefits under any policy of insurance.

SIXTH DEFENSE

Plaintiff, through its own acts or omissions, has breached the cooperation clause under any applicable policy of insurance.

SEVENTH DEFENSE

Plaintiff's alleged damages and the claims and causes of action against the Kootenai County defendants in the *Paradis* lawsuit are and were not covered, or are otherwise excluded, under the insurance policy issued to plaintiff by defendant Northfield.

EIGHTH DEFENSE

Defendant Northfield had no contractual duty or legal obligation to defend Kootenai County or its employees in the *Paradis* lawsuit or to participate in any mediation or settlement of the *Paradis* lawsuit.

NINTH DEFENSE

Plaintiff, at various time since plaintiff began insuring Kootenai County and its employees, had other policies of indemnity or reimbursement insurance than the policy or policies issued by defendant to plaintiff herein. Such policy or policies of insurance are primary to any policy provided to plaintiff by defendant Northfield, and/or any policy provided by defendant Northfield is excess or shares any monetary obligation to indemnify or reimburse plaintiff on a pro rata basis with such other insurance. In asserting this defense, defendant Northfield does not admit that any policy or policies of insurance issued by it provide coverage to plaintiff for the defense costs incurred in or settlement of the *Paradis* lawsuit.

TENTH DEFENSE

Plaintiff's insureds, Kootenai County and/or its employees, had liability insurance other than liability insurance provided by plaintiff, insuring against liability for the event, events, occurrence or occurrences which gave rise to the *Paradis* lawsuit. Plaintiff either had no coverage of Kootenai County and its employees, or if it is determined there was coverage, plaintiff's insurance of Kootenai County and its employees named in the *Paradis* lawsuit was either excess to or pro rata with such other insurance.

ELEVENTH DEFENSE

Defendant's breach of contract, if any, is excused by the plaintiff's preceding material breach of contract.

TWELFTH DEFENSE

Plaintiff's breach of contract claim is barred by the parol evidence rule and/or by the doctrine of integrated contracts.

THIRTEENTH DEFENSE

Plaintiff undertook the defense of Kootenai County and its employees and settled with Paradis without contractual obligation to do so, and was therefore a volunteer. Defendant has no obligation to indemnify or reimburse plaintiff.

RESERVATION OF DEFENSES

Defendant, by virtue of pleading a defense above, does not admit that said defense is an "affirmative defense" within the meaning of applicable law, and Defendant does not thereby assume a burden of proof or production not otherwise imposed upon it as a matter of law. In addition, in asserting any of the above defenses, Defendant does not admit any fault, responsibility, liability or damage but, to the contrary, expressly denies the same. Discovery has yet to commence, the results of which may disclose the existence of facts supporting further and additional defenses. Defendant, therefore, reserves the right to seek leave of this Court to amend its Answer as it deems appropriate.

REQUEST FOR ATTORNEY FEES

In order to defend this action, defendant Northfield has been required to retain the services of Hall, Farley, Oberrecht & Blanton, P.A. to defend this matter, and is entitled to recover its attorney fees and costs incurred herein, pursuant to Idaho Code §§ 12-120, 12-121,

and 12-123, Idaho Rule of Civil Procedure 54, and any other applicable statute, rule, or regulation.

DEMAND FOR JURY TRIAL

Pursuant to the provisions of Rule 38(b) of the Idaho Rules of Civil Procedure, defendant Northfield hereby demands trial by jury as to all issues so triable in this matter, by a jury of not less than twelve (12) persons.

WHEREFORE, Northfield Insurance Company prays for judgment as follows:

1. That plaintiff's Complaint and demand for jury trial be dismissed with prejudice and that plaintiff takes nothing thereby;

2. For judgment against plaintiff for defendant Northfield's costs and attorney fees incurred in the defense of this matter; and

3. For such other and further relief as this Court may deem just and proper under the circumstances.

DATED this 20 day of October, 2006.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By _____
Donald J. Farley - Of the Firm
Bryan A. Nickels – Of the Firm
Attorneys for Defendant Northfield
Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of October, 2006, I caused to be served a true copy of the foregoing ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL, by the method indicated below, and addressed to each of the following:

Phillip J. Collaer
Anderson, Julian & Hull, LLP
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

✓ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy

Donald J. Farley
Bryan A. Nickels

Phillip J. Collaer, ISB No. 3447
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: pcollaer@ajhlaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff,

vs.

NORTHLAND INSURANCE COMPANIES, a Minnesota corporation,

Defendant.

Case No. CV OC 0617112

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW plaintiff, by and through its counsel of record, Anderson, Julian & Hull, and moves this Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, for entry of partial summary judgment in favor of plaintiff on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

EC

DATED this 17 day of November, 2006.

ANDERSON, JULIAN & HULL LLP

By _____
Phillip J. Collaer, Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17 day of November, 2006, I served a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Donald J. Farley
Bryan A. Nickels
Hall, Farley, Oberrecht & Blanton, PA
702 W. Idaho, Suite 700
PO Box 1271
Boise, Idaho 83701-1271
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
Attorneys for Defendant

- ☒ U.S. Mail, postage prepaid
- ☐ Hand-Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Electronic Delivery

Phillip J. Collaer

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\2\2-241.14\MSJ-Response.doc

Attorneys for Defendant Northland Insurance Companies,
Properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff,

vs.

NORTHLAND INSURANCE COMPANIES,

Defendant.

Case No. CV OC 0617112

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW the defendant, Northfield Insurance Company ("Northfield"), by and through its undersigned counsel of record, and hereby submits its response to Plaintiff Idaho Counties Risk Management Program Underwriter's (hereinafter "ICRMP") Motion for Partial Summary Judgment ("plaintiff's Motion"). For the reasons stated below, plaintiff's Motion should be denied.

INTRODUCTION

ICRMP filed its complaint in this action against Northfield alleging that Northfield had breached an insurance contract between Northfield and ICRMP. However, plaintiff's Motion has nothing to do with the insurance contract between ICRMP and Northfield. Instead, ICRMP asks this Court to, in reality, issue an advisory opinion on an issue that is irrelevant and immaterial to whether there is or was coverage under the insurance policy issued by Northfield to ICRMP. Plaintiff's Motion asks the Court to rule, one way or the other, whether ICRMP had a duty to defend Kootenai County in the Paradis civil rights case brought against Kootenai County. Apparently, ICRMP believes that a ruling confirming that ICRMP did, as a matter of law or fact, have a duty to defend Kootenai County in the Paradis case, under the liability policy ICRMP sold to Kootenai County, somehow enhances or may enhance its claim that Northfield breached the insurance policy between Northfield and ICRMP.

But the policy issued by Northfield to ICRMP is not reinsurance, as ICRMP tries to describe. Regardless of whether ICRMP had a duty under its policy of liability insurance issued to Kootenai County to defend the county and its former employees and prosecutors in the Paradis case, the policy of reimbursement insurance between Northfield and ICRMP does not contain a duty to defend clause. The reimbursement policy issued by Northfield to ICRMP, and which ICRMP alleges in its complaint was breached, is an 'occurrence' policy, the terms of which (and ICRMP's rights under it) stand alone, unrelated to ICRMP's liability policy insuring Kootenai County and its employees. Only if there is coverage under the terms of the Northfield policy issued to ICRMP does Northfield have any obligation to reimburse ICRMP for the monies ICRMP expended in defending and settling the Paradis lawsuit.

As will be demonstrated in this response, and further addressed in a motion for summary judgment by Northfield, the reimbursement policy issued by Northfield did not, and does not, provide coverage for the Paradis defense costs and settlement paid by ICRMP to Mr. Paradis. Consequently, addressing the issue of whether ICRMP had a duty to defend Kootenai County in the Paradis case, especially at this early stage of this case, serves no purpose to the resolution of the issues in this lawsuit between ICRMP and Northfield.

Furthermore, Northfield has propounded extensive written discovery to ICRMP which ICRMP has not yet answered and which may be instructive, or at least disclose facts related to Northfield's response to plaintiff's Motion. As set forth in Northfield's Rule 56(f) Motion, responses to Northfield's discovery to ICRMP were due on November 28, 2006. Northfield granted to ICRMP a one-week extension to December 4, 2006 to respond, believing it would have responses and documents from such discovery before the due date for this brief. ICRMP has yet to respond, however. Therefore, Northfield reserves the right to supplement this response as may be necessary to include further argument and facts related to plaintiff's Motion based upon ICRMP's discovery responses.

ICRMP's Motion for Partial Summary Judgment should be denied, or, at a minimum, the Court should defer ruling on plaintiff's Motion so that it can be addressed along with Northfield's motion for summary judgment.

STATEMENT OF FACTS IN DISPUTE

As an initial matter, defendant Northfield notes that, as discussed above, the issue posed to the Court by plaintiff's Motion is irrelevant to the plaintiff's claim for breach of contract against Northfield. As such, a vast majority of the alleged facts identified by ICRMP in support of plaintiff's Motion have no bearing or relevancy to the claims in this action, as they primarily focus on ICRMP's handling of the Paradis matter under its own policy. Based upon this lack of

relevancy – and as Northfield still seeks discovery responses from ICRMP – there are but few material facts that Northfield disputes at this juncture.[1] Most importantly, plaintiff attempts to characterize the Northfield policy as "reinsurance," which is incorrect. The particular facts alleged by ICRMP in plaintiff's Motion, disputed by Northfield, are as follows:

1. "Since its inception [1985] through the 2000-2001 policy year, ICRMP purchased reinsurance from Northland Insurance Companies (Northland)." (plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment ("plaintiff's Memo"), at 2) – As discussed more thoroughly below, the Northfield insurance policy issued to ICRMP, which is the policy ICRMP alleges in its complaint was breached, is not "reinsurance." Such a characterization suggests that the Northfield policy "follows form" and/or "follows the fortune" and contains such provisions. Such provisions are not present in the Northfield Policy. To the contrary, the Northfield policy is, instead, a reimbursement insurance policy, subject to its own terms and conditions, isolated and separate from any provisions of the ICRMP policy. Further, plaintiff has not identified nor otherwise provided copies of any such policies for the claimed years. Rather, upon a review of Northfield's records, it appears that Northfield only issued the reimbursement policies to ICRMP for 1986-88 and 1994-2001. Affidavit of Brian R. Martens in Support of Defendant's Response to Plaintiff's Motion for Partial Summary Judgment ("Martens Aff."), at ¶2. A copy of the Northfield Public Entity All Lines Aggregate Insurance Policy issued to ICRMP for the 2000 – 2001 year is attached to Mr. Martens' affidavit.

2. "The *Paradis* Complaint focused upon the circumstances surrounding Mr. Paradis' initial arrest, conviction, and incarceration for the murder of Kimberly Ann Palmer." (plaintiff's Memo at 3) – Notably absent from plaintiff's discussion – and exceptionally relevant

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[1] To the extent necessary, Northfield will address additional specific facts alleged by ICRMP following discovery, as requested in Northfield's Rule 56(f) Motion.

to this action – is when the acts by Kootenai County and its law enforcement employees and prosecutors occurred, which Mr. Paradis claimed in his complaint violated his civil rights and resulted in his conviction for murder. Mr. Paradis was initially convicted of first degree murder in 1981, and subsequently sentenced to death. Affidavit of Lynnette McHenry in Support of Plaintiff's Motion for Partial Summary Judgment ("plaintiff's Affidavit"), Exhibit 4, Memorandum Decision and Order at 2-3. Mr. Paradis' complaint alleges that his first appearance in an Idaho court was on November 26, 1980, and that he was incarcerated in various places from June 23, 1980 until April 10, 2001. *Id.*, Exh. 2, at ¶¶5 & 41. The *Paradis* complaint alleged the defendants failed to produce exculpatory evidence in advance of his trial which resulted in his murder conviction. Significantly, however, the retroactive date for Northfield's reimbursement coverage of ICRMP relating to Kootenai County – for Section IV coverage (Errors or Omissions) – is November 29, 1985, approximately four years after the acts complained of by Mr. Paradis.[2] Plaintiff has attempted to brush these key dates aside, asserting simply that the Paradis action alleged 'continuing torts' (plaintiff's Memo at 4-5) – essentially arguing that the actual acts complained of have no meaning in the coverage determination. The dates Paradis alleged that Kootenai County withheld evidence and otherwise committed the acts giving rise to Paradis' lawsuit are crucial to the understanding of this action, and will be more thoroughly addressed in defendant's own motion for summary judgment later in this litigation.

3. "A copy of the reservation of rights letter was forwarded to Northland Insurance Companies." (plaintiff's Memo at 4). Defendant Northfield was forwarded an unsigned copy of the referenced June 30, 2003, reservation of rights letter by way of correspondence from ICRMP dated March 2, 2003 (correctly 2006, as noted by the stamp and the content of the

[2] The ICRMP policy (McHenry Aff., Exh. 1) also contains a retroactive date – for Section IV Errors and Omissions liability – of November 29, 1985.

correspondence). Martens Aff., Exh. B. Additionally, note that ICRMP did not provide notice that it had exhausted its $150,000 self-insured retention until June 27, 2006 – after it had incurred a total of $423,305.33 in defense costs. Martens Aff., Exh. C.

SUMMARY JUDGMENT STANDARD

Motions for summary judgment should be granted only when no genuine issues of material fact exist after the pleadings, deposition, admission and affidavits have been construed most favorably to the non-moving party and the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); Johnson v. Studley-Preston, 119 Idaho 1055, 1057, 812 P.2d 1216, 1218 (1991). Additionally, the court must construe the record liberally in favor of the non-moving party and draw all reasonable factual inferences in favor of such party. Bear Lake West Homeowner's Assoc. v. Bear Lake County, 118 Idaho 343, 346, 796 P.2d 1016, 1019 (1990). Furthermore, all doubts are to be resolved against the moving party and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. Parker v. Kokot, 117 Idaho 963, 966, 793 P.2d 195, 198 (1990). If the summary judgment proceeding involves the interpretation of unambiguous legal documents, the interpretation of those documents is a question of law for the trial court. *Id.* If the documents are ambiguous their interpretation is a question of fact for the trier of fact. *Id.*

ARGUMENT

A.. Defendant's Motion Does Not Dispense of Any "Claim, Counterclaim or Cross-Claim" Between Northfield and ICRMP.

Idaho Rule of Civil Procedure 56(a) provides, in relevant part:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the service of process upon the adverse party or that party's appearance in the action or after service of a motion for summary judgment by the adverse

party, move with or without supporting affidavits for a summary judgment in that party's favor upon all or any part thereof.

Plaintiff's Motion fails to meet the ends intended by IRCP 56. It does not dispense with any "claim, counterclaim, or cross-claim." Rather, plaintiff simply seeks the Court's ruling that plaintiff had its own duty to defend Kootenai County under ICRMP's own policy of liability insurance issued to Kootenai County; if plaintiff prevails, no "claim, counterclaim, or cross-claim" is resolved, and no judgment of any kind can be entered against defendant. *See* Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment ("plaintiff's Memo"), at 20 ("The question of whether ICRMP was obligated to defend the *Paradis* lawsuit presents a clear issue of law.").

The present action relates to plaintiff's claims regarding defendant's alleged duties and obligations under the policy defendant issued to ICRMP; to wit, a breach-of-contract claim that defendant Northfield has failed to reimburse ICRMP under the policy between Northfield and ICRMP. However, the issues addressed in plaintiff's Motion do not establish – nor even address – this single claim against defendant Northfield. The plaintiff has not even filed a copy of a Northfield policy in conjunction with its motion. To the contrary, plaintiff is asking the Court to rule on its own obligations under its own policy ICRMP issued to Kootenai County.

Defendant's Motion fails to meet the ends posited by I.R.C.P. 56, and should be denied.

B. Plaintiff's Motion Seeks an Advisory Opinion of the Court.

Similar to plaintiff's Motion's failure to meet the requirements of Rule 56, plaintiff's Motion, for the same reason, seeks an advisory opinion of the Court, i.e., to rule on ICRMP's duty to defend under the policy issued by ICRMP to Kootenai County. However, under Idaho law, advisory opinions are not favored. *See, e.g.*, Gafford v. State, 127 Idaho 472, 477-78, 903 P.2d 61, 66-67 (1995)("Raising such a claim in the absence of a concrete dispute relating to the release provisions would be a futile act since it would constitute a request for an advisory

opinion which would be denied by the courts of this state."); Schneider v. Howe, 142 Idaho 767, 133 P.3d 1232, 1237 (2006)("Although the Declaratory Judgment Act, Idaho Code Title 10, chapter 12, bestows the authority to declare rights, status, or other legal relations, that authority is circumscribed by the rule that "a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists.")(citing *Harris v. Cassia County,* 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). Courts are to look at the nature of the action to determine whether or not an advisory opinion is being sought:

> [A] controversy in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

State v. Rhoades, 119 Idaho 594, 598, 809 P.2d 455, 459 (1991)(re: declaratory actions)(quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241-42, 57 S. Ct. 461, 464, 81 L.Ed. 617 (1937)).

In the present case, as discussed above, ICRMP seeks a ruling from this Court as to its duty to defend under the policy ICRMP issued to Kootenai County. However, in this action, the question has no bearing on the breach of contract action between ICRMP and Northfield, and does not relate to the policy between Northfield and ICRMP; Kootenai County is not even present as a party to this litigation to respond to the allegations made by ICRMP. Thus, plaintiff's Motion seeks an advisory ruling, and should be denied on those grounds.

C. Any defense obligations borne by ICRMP are the result of the ICRMP policy language, and do not relate to the language of the Northfield policy.

As an initial matter, it is important to note that plaintiff's Motion relates only to whether ICRMP had a duty to defend Kootenai County under the ICRMP policy, and contains no discussion of any such duty under the Northfield policy. Under the ICRMP policy, ICRMP has an explicit obligation to defend its insureds for covered claims:

> 9. **Defense of Claims or Suit.** We may investigate or settle any covered claim or suit against you, following review and consultation with you. We will provide a defense with counsel of our choice, at our expense, if you are sued for a covered claim. Our obligation to defend any claim or suit ends when the amount we pay equals the Limits of Coverage afforded under this Policy, plus accrued costs of defense.

McHenry Aff., Exh. 1, General Conditions, ¶9 (p. 2). The ICRMP/Kootenai County policy has the standard duty to defend clause found in virtually all comprehensive general liability policies. However, the Northfield policy is devoid of any similar duty-to-defend language, making no provision for the defense and settlement of claims arising under the ICRMP policy (such as Kootenai County's tender of defense to ICRMP for the Paradis action). In fact, the Northfield policy references only claims covered by the Northfield policy itself, and under the General Insuring Agreements, the Northfield policy provides:

> It is understood that all claims under this policy shall be serviced by I.C.R.M.P.'s Claims Department who shall perform the following duties:
> A. Investigate and settle or defend all claims or losses – it is understood that, when so requested, the I.C.R.M.P. Claims Department will afford Underwriters any opportunity to be associated with them in the defense or control of any claim, suit or proceeding.

Martens Aff., Exh. A, at p. 5 (emphasis added). Similarly, the Northfield policy provides that:

> For Section II, . . . "[u]ltimate net loss" shall also include hospital, medical and funeral charge and all sums paid as salaries, wages, compensation, fees, expenses for doctors and nurses, also law costs, premiums on attachment of appeal bonds, expenses for lawyers and investigators and other persons for litigation, settlement,

adjustment and investigation of claims or suits which are paid as a consequence of any occurrence covered hereunder.

Id. at p. 40 (emphasis added). In fact, a review of the Northfield policy yields only a reference to "an underlying Self-Insured Retention (S.I.R.) of $150,000 each and every loss and/or claim and/or occurrence ultimate net loss . . . .", and does not reference coverages under the ICRMP policy. *Id.* at p. 3 (emphasis in original). Thus, lacking language mirroring the ICRMP policy's duty-to-defend provision, or even any reference thereto, argument that ICRMP had a duty to defend Kootenai County is irrelevant to any coverage under the Northfield reimbursement policy, and irrelevant to the relationship between ICRMP and Northfield under the reimbursement insurance.

Accordingly, plaintiff's Motion should be denied, as plaintiff's duty-to-defend arguments have no bearing on whether there was coverage of ICRMP under the Northfield policy for reimbursement of ICRMP for any of the costs to defend Kootenai County or its employees.

D. Defendant Northfield's policy is not reinsurance.

Plaintiff's motion appears to be an attempt to set up a future summary judgment motion (or two) regarding the breach of contract action. Implicitly, plaintiff's argument (which is anticipated at hearing and/or in plaintiff's summary judgment reply) is a two-step transitive argument: ICRMP had a duty to defend Kootenai County; ergo, Northfield had an obligation, under its policy, to reimburse ICRMP for defense and settlement amounts in the *Paradis* action. However, this argument suffers a key logical flaw – the Northfield policy is not reinsurance. Whether the Northfield policy covers ICRMP must be determined by interpreting the language of Northfield's policy, not the ICRMP/Kootenai County policy attached to plaintiff's Motion.

In the most general sense, "reinsurance . . . is simply insurance for insurance companies." Continental Casualty Co. v. Stronghold Ins. Co., 77 F.3d 16, 20 (2nd Cir. 1996). Ancillary to this principle is the principle that reinsurers have no duty to defend. *See, e.g.,* Insurance Co. of State

of Pennsylvania v. Associated Int'l Ins. Co., 922 F.2d 516, 523 (9th Cir. 1990)("Reinsurers have no duty to defend claims . . . ."). Importantly, reinsurance policies are typically identified by the presence of "follow form" and/or "follow the fortune" provisions:

> Reinsurance is purchased by insurance companies to insure their liability under policies written to their insureds. Typically, an insurer who has provided coverage against a large loss will cede all or part of that risk to other insurance companies along with a portion of the premiums. Ceding risk increases the insurer's capacity to insure other customers and decreases the likelihood that insurer insolvency will result from any large claim.
>
> There are two types of reinsurance contract: treaty and facultative. Under a reinsurance treaty, the reinsurer agrees to accept an entire block of business from the reinsured. Once a treaty is written, a reinsurer is bound to accept all of the policies under the block of business, including those as yet unwritten. Because a treaty reinsurer accepts an entire block of business, it does not assess the individual risks being reinsured; rather, it evaluates the overall risk pool. *Id.*
>
> Facultative reinsurance entails the ceding of a particular risk or policy. Unlike a treaty reinsurer who must accept all covered business, the facultative reinsurer assesses the unique characteristics of each policy to determine whether to reinsure the risk, and at what price. Thus, a facultative reinsurer "retains the faculty, or option, to accept or reject any risk."
>
> The reinsurance relationship depends on the reinsurer and the reinsured observing high levels of good faith. The reinsured must keep its interests aligned with those of the reinsurer, . . . and the reinsurer must "follow the fortunes" of the reinsured[.]
>
> Reinsurance certificates usually employ standard forms. A reinsurance certificate typically includes a "following forms" provision that expressly limits the reinsurance to the terms and conditions of the underlying policy and provides that the reinsurance certificate will cover only the kinds of liability covered in the original policy issued to the insured. The reinsurance certificate often, as here, also includes a "follow the fortunes" clause, which is somewhat broader than the "following forms" clause and obligates the reinsurer to indemnify the reinsured for any good faith payment of an insured loss.
>
> "Follow the fortunes" clauses prevent reinsurers from second guessing good-faith settlements and obtaining de novo review of judgments of the reinsured's liability to its insured. But while a "follow the fortunes" clause limits a reinsurer's defenses, it does not make a reinsurer liable for risks beyond what was agreed upon in the reinsurance certificate. In that regard, the reinsurer retains the right to question whether the reinsured's liability stems from an unreinsured loss. A loss would be unreinsured if it was not contemplated by the original insurance policy or if it was expressly excluded by terms of the certificate of reinsurance.

North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1199-1200 (3rd Cir. 1995)(internal citations omitted). A follow-the-form clause will include language akin to: "the liability of the Reinsurer specified in Item 4 of the said Declarations shall follow that of the Company and except as otherwise specifically provided herein, shall be subject in all respects to all the terms and conditions of the Company's policy." Travelers Cas. And Sur. Co. v. Ace American, 392 F. Supp.2d 659, 662 (S.D.N.Y. 2005). Similarly, a follow-the-fortunes clause will incorporate language similar to: "All claims involving this reinsurance, when settled by [Commercial Union], shall be binding on [Swiss Re], which shall be bound to pay its proportion of such settlements promptly following receipt of proof of loss." Commercial Union Ins. Co. v. Swiss Reinsurance America, 413 F.3d 121, 124 (1st Cir. 2005). A "follow the fortunes" clause encapsulates the "follow the fortunes" doctrine recognized in some jurisdictions, which generally holds that "a reinsurer is required to indemnify for payments reasonably within the terms of the original policy, even if technically not covered by it." Travelers Cas. And Sur. Co., 392 at 664, n5. The "follow the fortunes" doctrine is not without its own limits:

> But, "[w]hile the 'follow the fortune' clause is certainly a broad one, it is clear that the reinsurer is liable only for 'a loss of the kind reinsured.'" . . . This protection for the reinsurer is based on principles of contractual intent: a reinsurer cannot be held liable for a kind of loss that it did not agree to cover. This distinction between reinsured and unreinsured risk is particularly important in facultative reinsurance where the reinsurer accepts only specific risks.

North River, 52 F.3d at 1206-07.

Note, however, that not all jurisdictions agree that the "follow the fortunes" doctrine is implied in any reinsurance contract. For example, in Michigan, the Court of Appeals has rejected just such a proposition in analyzing a reinsurance policy lacking a "follow the fortunes" clause:

> The reasoning and explanation of reinsurance law provided by the *Michigan Millers* Court is particularly instructive in this setting. There, our Court

pointed to 19 Couch, Insurance, 2d, § 80.66, pp. 673-674, to emphasize that "[t]he extent of the liability of the reinsurer is determined by the language of the reinsurance contract, and the reinsurer cannot be held liable beyond the terms of its contract merely because the original insurer has sustained a loss." *Id.* at 414, 452 N.W.2d 841. At another point in *Michigan Millers,* this Court stated:

> Although it is true that parties may agree to such terms in reinsurance as will bind the reinsurer to the settlement or adjustment of loss made between the parties to the original insurance, 19 Couch on Insurance 2d, § 80.13, p. 631, we will not impose liability on the reinsurer for a settlement contribution absent such an agreement.
>
> Such statements respecting reinsurance are completely consistent with a plethora of Michigan cases in the field of insurance law. For example, in *Lehr v. Professional Underwriters,* 296 Mich. 693, 697, 296 N.W. 843 (1941), our Supreme Court stated: "The liability was limited in the policy. To hold otherwise would be to write a new contract for the parties. This we have no right to do."
>
> After careful consideration, we conclude and hold that the learned trial court erred in reading into the reinsurance contract at issue in this case a "follow the fortunes" clause that was not agreed to by the parties.

Michigan Tp. Participating Plan v. Federal Ins. Co., 592 N.W.2d 760, 764-65 (Mich. App. 1999). This would be consistent with Idaho law, which holds that "[w]here policy language is found to be unambiguous, the Court is to construe the policy as written, 'and the Court by construction cannot create a liability not assumed by the insurer nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability.'" Purvis v. Progressive Cas. Ins. Co., 142 Idaho 213, ___, 127 P.3d 116, 119 (2005). With respect to the Northfield policy, the policy does not provide any "follow-form" and/or "follow the fortunes" language, thereby lacking a key hallmark of a classic reinsurance policy. *See* Martens Aff., Exh. A. To the contrary, the Northfield policy provides specific terms and conditions, covering very particular risks. For example, for Northfield to have any obligation to reimburse ICRMP for defense costs and indemnify above the SIR in the Northfield policy, the coverage language in the Northfield policy must apply. Here, as explained further below, the occurrence which gave rise to Mr. Paradis' complaint took place years before

the Northfield policy was issued. Thus, no conclusion can be reached that Northfield's policy constitutes classic reinsurance such that plaintiff's Motion would have any bearing on the issues in this matter; to wit, whether the terms of Northfield's policy provide coverage of ICRMP for the *Paradis* defense costs and settlement amount paid.

Moreover, analysis of reinsurer status may also be had by a determination of the extent of premium transfer from the underlying insured risks. Classic reinsurance policies typically involve the transfer of underlying premiums as a function of the reinsurer's assumption of the underlying insurer's risk. As explained by the U.S. Supreme Court:

> In order to spread the risks on policies they have written or to reduce required reserves, insurance companies commonly enter into reinsurance agreements. Under these agreements, the reinsurer pays the primary insurer, or "ceding company," a negotiated amount and agrees to assume the ceding company's liabilities on the reinsured policies. In return, the reinsurer receives the future income generated from the policies and their associated reserve accounts.
>
> Reinsurance comes in two basic types, assumption reinsurance and indemnity reinsurance. In the case of assumption reinsurance, the reinsurer steps into the shoes of the ceding company with respect to the reinsured policy, assuming all its liabilities and its responsibility to maintain required reserves against potential claims. The assumption reinsurer thereafter receives all premiums directly and becomes directly liable to the holders of the policies it has reinsured.
>
> In indemnity reinsurance, which is at issue in this case, it is the ceding company that remains directly liable to its policyholders, and that continues to pay claims and collect premiums. The indemnity reinsurer assumes no direct liability to the policyholders. Instead, it agrees to indemnify, or reimburse, the ceding company for a specified percentage of the claims and expenses attributable to the risks that have been reinsured, and the ceding company turns over to it a like percentage of the premiums generated by the insurance of those risks.
>
> Both the assumption and the indemnity reinsurer ordinarily pay an up-front fee, known as a "ceding commission," to the ceding company.[FN1]
>
> [FN1] - There is a form of indemnity reinsurance known as risk-premium, or yearly-renewable-term, reinsurance that does not involve ceding commissions. Under risk-premium reinsurance, much like a normal insurance policy, the ceding company typically pays an annual premium to the reinsurer in return for which the reinsurer promises to reimburse the ceding company should identified losses arise.

Colonial American Life Ins. Co. v. C.I.R., 491 U.S. 244, 246-48, 109 S. Ct. 2408, 2411-12 (1989). These categories address the means by which risk and/or premiums are transferred. In the present action, only a premium was paid to Northfield by ICRMP, further demonstrating that the Northfield policy is not classic reinsurance, and would only be analogous to risk-premium reinsurance – which simply follows the traditional insurance payment models (payment of a premium to insure risk).

Although lengthy discussion, as above, is required to identify the nature of the Northfield policy, the distinction between classic reinsurance and the Northfield policy is key in this instance, as plaintiff's fundamental argument in this action will be that Northfield must simply write a check for whatever amounts ICRMP expended. However, the Northfield policy is not classic reinsurance, and instead only insures those risks which are enumerated within Northfield's own policy. It is likely this distinction that led the Montana Supreme Court to characterize a Northfield Public Entities All Lines Aggregate Insurance Policy as a "secondary assurance policy," rather than 'reinsurance.' Northfield Ins. Co. v. Montana Ass'n of Counties, 10 P.3d 813, 814 (Mont. 2000). Accordingly, it is the coverage provided by the Northfield policy, not the actions taken by ICRMP or coverage under the ICRMP/Kootenai County policy, which is salient to the rights and obligations arising from the Northfield policy which is at the center of this lawsuit.

Accordingly, a ruling on plaintiff's Motion is, again, simply an advisory opinion, as it has no bearing on the application of the terms and conditions of Northfield's policy. The Northfield policy is not classic reinsurance, and any obligations under ICRMP's policy do not define or otherwise set the parameters of the coverage afforded by the Northfield policy. Accordingly, plaintiff's Motion should be denied.

E. ICRMP did not have a duty to defend.

Although plaintiff's Motion addresses, only minimally, the relationship between ICRMP and Northfield (and otherwise fails to address any component of its breach-of-contract action), defendant Northfield responds briefly to the thrust of plaintiff's Motion herein. Despite the defense provision provided for in the ICRMP policy, as discussed above, ICRMP did not have a duty to defend the Kootenai County individuals in the Paradis action. ICRMP did not seek a judicial ruling on whether to defend the Paradis case. It simply made its own decision, for its own reasons, under its own policy.

1. The duty to defend, generally.

Plaintiff cites to Kootenai County v. Western Cas. & Sur. Co., 113 Idaho 908, 750 P.2d 87 (1988), in arguing that it was obligated, by the phrasing of the complaint, to provide a defense to the Kootenai County defendants. However, the Kootenai County decision certainly did not present an unbounded duty to defend proposition, as was explained in the later Black v. Fireman's Fund American Ins. Co. decision:

> We have recognized that an insurer has a duty to defend its insured where the facts alleged in the complaint, if true, would bring the case within the insurance policy's coverage. The basis for this rule is simple. To allow the insurer to avoid providing defense on questionable claims would frustrate one of the insured's basic purposes in procuring insurance coverage--protection from the expenses of litigation. This duty is separate, unrelated, and much broader than the insurer's duty to pay damages. However, the insurer's duty to defend is not absolute. This Court has recognized that an injured third-party's claims against an insured must provide some link to the insurance agreement. Our Supreme Court recently adopted a broad statement with regard to when an insurer must provide coverage. In *County of Kootenai v. Western Casualty and Surety Co.,* 113 Idaho 908, 750 P.2d 87 (1988), the Court said:
>
> [t]he duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a *potential* for liability that would be covered by the insured's policy. [Emphasis original.]
>
> These cases typify the progressive attitude of the Idaho Courts regarding claims for breach of the duty to defend.

115 Idaho 449, 455, 767 P.2d 824, 830 (Ct. App. 1989) 115 Idaho at 455 (internal citations omitted)(emphasis added). This clarification, that an insurer's duty to defend is not absolute, is important, especially in light of a more recent statement by the Idaho Supreme Court: "This language [in Kootenai], while admittedly broad, does not require an insurance company to file a declaratory judgment in every instance, even though it believes there is no potential for coverage, and then tender a defense until the lack of coverage is established." Hoyle v. Utica Mut. Ins. Co., 137 Idaho 367, 371, 48 P.3d 1256, 1260 (2002).

2. The ICRMP policy.

Two points not fully addressed by plaintiff with respect to the ICRMP policy are worth noting for the purposes of additional clarification relevant to the discussion herein.

First, plaintiff asserts that "[b]ecause Paradis was released from prison in April of 2001, the 2000-2001 ICRMP policy was triggered." Plaintiff's Memo at 12. Plaintiff cites no other trigger dates for the coverage or even any authority for the proposition, although the acts that Mr. Paradis sued upon occurred some 20 years earlier. The effect of this timing issue is discussed below.

Additionally, plaintiff cites only to Section II of the ICRMP policy, the Comprehensive General Liability section.[3] Plaintiff does not appear to rely on any other Sections of the policy. Accordingly, as necessary, the discussion herein addresses only the language of that section.

3. The first *Paradis* complaint.[4]

Plaintiff claims that Counts I, IV, V, IX, X, and XI of the first Paradis complaint constitute "continuing torts" which, although commencing years – even decades – earlier, fall

---

[3] Plaintiff does not, for example, cite Section IV, the Errors and Omissions provision, likely because that section is explicitly identified as a "claims-made" section; as plaintiffs aver that Kootenai County first notified them of the Paradis suit in or after April 2003, plaintiff would be unable to assert that possible ICRMP coverage under an ICRMP policy in effect in 2003 would have any bearing on the Northfield policy of 2000-2001.

[4] Plaintiff identifies only Counts I, IV, V, IX, X, and XI as the counts giving rise to ICRMP's claimed duty to defend. Plaintiff's Memo at 8-9 & 14-15. As such, only these counts are discussed.

within the purview of the ICRMP's 2000-2001 coverage, thus requiring ICRMP to defend. Plaintiff's Memorandum at 8-9 & 14-15. These Counts addressed the following:

- Count I – Brady violation – Mr. Paradis alleged that the subject Kootenai County defendants failed to provide the defense with exculpatory evidence, and/or caused a medical witness (Dr. Brady) to "give false, exaggerated and unsupportable testimony". McHenry Aff., Exh. 1, ¶70. Although alleging an ongoing duty to provide the defense with exculpatory evidence, the Paradis complaint made clear that the exculpatory evidence at issue was gathered prior to Mr. Paradis' conviction, and that the testimony of Dr. Brady occurred in 1981. *Id.* at ¶¶32-38, & 47-57.
- Counts IV & V – Negligence, False Arrest, Malicious Prosecution, and False Imprisonment – Again, Mr. Paradis alleged that he suffered harm as a result of the undisclosed exculpatory evidence (¶¶84-85), and referenced his claims in Count I by reference (¶88).
- Counts IX, X, & XI – Negligence, Intentional Infliction of Emotional Distress, and Defamation – Here, the allegations made by Mr. Paradis relate to a habeas action in 1986, wherein Mr. Paradis contends that Mr. Haws (the Chief Deputy Prosecuting Attorney) continued to conceal the exculpatory evidence, resulting in Mr. Paradis serving another 14 years in prison (¶¶114-119). Additionally, Mr. Paradis asserted that: "[t]hroughout his involvement in the Paradis and Gibson cases, both when serving as a prosecutor and after, Haws made repeated public and extra-judicial statements to a variety of news media outlets" (¶120), "which perpetuated his contrived and unsupportable theories as discussed herein, and

which consistently cast both Plaintiff and his claims of innocence in a false light." (¶122).

4. The *Paradis* Amended Complaint.

Plaintiff identifies four counts in the Amended Complaint that plaintiff asserts warranted continuation of its claimed duty to defend: Count I, VII, IX, and X. Plaintiff's Memo at 10-11. Again, plaintiff focuses on the asserted ongoing nature of these violations to assert that coverage was mandated. *Id.* These Counts addressed the following:

- Count I – Failure to Train re: *Brady* – Although alleging ongoing deficiencies in the training program, a reading of the Amended Complaint clearly demonstrates that the only damages alleged related to pre-conviction failures: "100. This deficiency in the County's training program and its supervision was closely related and causally linked to the constitutional injury suffered by Plaintiff-Paradis." (McHenry Aff., Exh. 5, at ¶100).
- Count VII – Negligent Training and Supervision – In his amended complaint, Mr. Paradis alleged that, as a result of the claimed negligent training and supervision, he was wrongfully arrested and convicted (¶158), resulting in "physical deterioration and injury, emotional distress and economic harm" (¶159) as a result of his confinement (¶¶211-214).
- Count IX – False Light Invasion of Privacy – As in the original complaint, Mr. Paradis alleged that Mr. Haws engaged in a series of public statements regarding plaintiff beginning in 1986 (¶174), and further alleged that Dr. Brady's testimony placed Mr. Paradis in a false light (¶172).

- Count X – Negligence and Intentional Infliction of Emotional Distress – Mr. Paradis alleged, in this count, that "[d]uring the investigatory phase Haws set into motion a conspiracy to wrongfully convict Plaintiff-Paradis" (¶181), thereafter again relating allegations regarding Mr. Haw's failure to disclose exculpatory evidence in 1980 and 1981, and his public statements regarding the case.

5. The *Paradis* allegations do not constitute "continuing torts" covered by the ICRMP policy.

As described above, the claims made by Mr. Paradis all arise from the actions made by the Kootenai County defendants relating to the investigation, prosecution, and conviction of Mr. Paradis in 1980 and 1981. Plaintiff specifically asserts that the continuing nature of the alleged violations created a duty to defend by ICRMP: "the *Paradis* Complaints contain allegations of negligence, false imprisonment and violations of civil rights which are described as continuing torts involving tortious activity on the part of the ICRMP insureds during the relevant policy period", which allegations "triggered a duty to defend under Idaho law." Plaintiff's Memo at 4-5.

In doing so, however, plaintiff attempts to blur the line between the analysis of continuous events for statute of limitations questions, versus analysis of continuous events for insurance purposes:

> Reliance on the commencement of the statute of limitation is not dispositive in determining when a tort occurs for insurance purposes. Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns. Statutes of limitation function to expedite litigation and discourage stale claims. *Bigansky v. Thomas Jefferson University Hosp.*, 442 Pa.Super. 69, 658 A.2d 423, 426 (1995). But when determining when a tort occurs for insurance purposes, courts have generally sought to protect the reasonable expectations of the parties to the insurance contract. *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir.1982).
>
> Because of this fundamental difference in purpose, courts have consistently rejected the idea they are bound by the statutes of limitation when seeking to determine when a tort occurs for insurance purposes. *See ACandS, Inc.*

> *v. Aetna Cas. and Sur. Co.,* 764 F.2d 968, 972 (3d Cir.1985) (statute of limitation cases "are not particularly relevant" to determining what event triggers insurance coverage); *Keene Corp. v. Ins. Co. of North America,* 667 F.2d 1034, 1043-44 (D.C.Cir.1981) (statute of limitation cases "are not at all relevant" and "have no bearing" in case seeking to determine when tort occurred for insurance purposes); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.,* 633 F.2d 1212, 1220 (6th Cir.1980) (because of differences in underlying policies, statute of limitation cases not relevant to determining when asbestos-related tort occurs for insurance purposes); *Commercial Union Assurance Co. v. Zurich American Ins. Co.,* 471 F.Supp. 1011, 1015 (S.D.Ala.1979) ("cases dealing with the determination of the date or occurrence of a continuing injury or disease for the purpose of applying appropriate statute of limitations are not controlling for purposes of determining insurance coverage"); *Southern Maryland Agric. Ass'n v. Bituminous Cas. Corp.,* 539 F.Supp. 1295, 1302-03 (D.Md.1982) (date on which statute of limitation begins to run not determinative of date when tort of malicious prosecution occurs); *S. Freedman & Sons v. Hartford Fire Ins. Co.,* 396 A.2d 195, 198-99 (D.C.1978) (statute of limitation "provides little assistance" and "need not determine" when tort of malicious prosecution occurs). For this reason, we do not believe the date on which the statute of limitation begins to run on malicious prosecution claims should determine when the tort occurs for insurance coverage purposes.

City of Erie, Pa. v. Guaranty Nat. Ins. Co., 109 F.3d 156, 161-62 (3rd Cir. 1997). Despite this, plaintiff relies on Curtis v. Firth, 123 Idaho 598, 850 P.2d 749 (1993), for the proposition that the "continuing tort" concept triggered a duty to defend in the Paradis action. However, the Curtis decision applied in the context of *statute of limitations analysis*, and not in the context of triggering insurance coverage, and is of no value to any analysis in this litigation. The same is true of the other case law cited by plaintiff – Ward v. Caulk, 650 F.2d 1144 (9th Cir. 1981) & Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989) – both cases relate to statute of limitations questions, and not to the triggering of coverage under insurance policies.

However, plaintiff fails to discuss Idaho caselaw directly on point to this question: Kootenai County v. Western Cas. & Sur. Co., 113 Idaho 908, 750 P.2d 87 (1988). In Western Cas., a county sheriff, acting upon a writ of execution, conducted a sale of property. However, in doing so, the sheriff failed to act in accord with the statutory notice periods, subjecting him to

civil penalties payable to the aggrieved party. Following the six month redemption period, the sheriff issued the deed to the subject property to the purchasers, as required by statute. During the redemption period, however, Kootenai County purchased an occurrence policy from Lloyd's and attempted to claim coverage, asserting that the delivery of the deed, in conjunction with the earlier failure to notify in relation to the sale, constituted an occurrence under the policy. However, the Idaho Supreme Court rejected this argument, noting that the only wrongful act was the improperly conducted sale. The court stated:

> The improper execution sale is not an event covered by the Lloyd's policy since it occurred almost six months prior to the effective date of the policy. An insurer is not liable "for claims arising out of an event or accident which occurred prior to the effective date of the insurance coverage, even though **damages and claims** continued to accrue from this cause during the later period of coverage."

113 Idaho at 915 (quoting Appalachian Ins. Co. v. Liberty Mutual Ins. Corp., 507 F. Supp. 59, 62 (W.D. Pa. 1981), aff'd 676 F.2d 56 (3rd Cir. 1982))(emphasis added). Here, the acts giving rise to the Paradis complaint relate to actions taken by the Kootenai County defendants in the investigation, prosecution, and conviction of Mr. Paradis in 1980 and 1981, all of which occurred 20 years prior to the effective date of the subject ICRMP policy. The damages complained of by Mr. Paradis relate to his incarceration which commenced on June 23, 1980 (McHenry Aff., Exh. 2, at ¶5). As such, damages and claims that accrued after these initial events do not fall under the coverage of liability policies that become effective at a later date (here, the ICRMP 2000-2001 policy).

Plaintiff relies on a New York decision, National Casualty Ins. Co. v. City of Mt. Vernon, 128 A.D.2d 332, 515 N.Y.S.2d 267 (1987), to argue that an allegation of false imprisonment occurring during a policy's coverage period even if imprisonment occurred at an earlier date, requires an insurer to defend. Plaintiff's Memo at 19-20. However, National Casualty is not instructive or dispositive for four key reasons:

- First, National Casualty is a New York decision, which holding would conflict with the binding decision of the Idaho Supreme Court in Western Cas.
- Second, the National Casualty court noted that "there is nothing in the policy which requires, as a prerequisite to ascertaining whether there is coverage, that the injury resulting from a causative event be reduced to a single or fixed occurrence in time." 515 N.Y.S.2d at 270. However, under the ICRMP policy, the definition of "occurrence" provides, in relevant part, that "All personal injuries to one or more persons and/or property damage arising out of an accident or **a continuous or repeated exposure to conditions shall be deemed one occurrence**." McHenry Aff., Exh. 1, at p. 14 (emphasis added). This language fundamentally shifts National Casualty away from any application in this action, as it reduces the claimed injury to a single event – Mr. Paradis' initial conviction and incarceration.
- Third, under Idaho law, false imprisonment occurs in the absence of lawful action. Griffin v. Clark, 55 Idaho 364, 373, 42 P.2d 297, 301 (1935) ("The true test [of false imprisonment] seems to be not the extent of the restraint, nor the means by which it is accomplished, but the lawfulness thereof"). In the Paradis complaint, Mr. Paradis only alluded to his arrest, prosecution, and conviction in the criminal justice system, and did not allude to any extra-judicial actions by any of the Kootenai County defendants. *See, e.g.,* Mundt v. U.S., 611 F.2d 1257, 1259 (9th Cir. 1980)("As Harper and James note: 'If the imprisonment is under legal process but the action has been carried on maliciously and without probable cause, it is malicious prosecution. If it has been extrajudicial, without legal process, it is false imprisonment.' 1 F. Harper & F. James, Law of Torts 232 (1956)."). Moreover, even if the initial arrest could be construed as false imprisonment, once the judiciary sanctioned Mr. Paradis' detention (e.g., through a bond

hearing), the 'ocean met the shore' – any false imprisonment would have ceased, and instead have become malicious prosecution.[5]

- Fourth, and finally, Mr. Paradis was convicted of first-degree murder and sentenced to death. (McHenry Aff., Exh. 2, ¶18) As a felon on death row, Mr. Paradis would have been transferred to the custody of the State of Idaho – in fact, Mr. Paradis's complaint acknowledges state custody, 15 years of which were spent on death row. *See, e.g., id.* at ¶¶5, 21, & 24. Any 'false imprisonment' (if construed as posed by plaintiff) by the Kootenai County defendants would have terminated once Mr. Paradis' custody transferred to the State of Idaho (apparently in 1981). Whether Mr. Paradis was wrongfully imprisoned by the State of Idaho is beyond the scope of the present dispute, and would not have been covered by ICRMP.

As such, plaintiff cannot argue that the allegations made by Mr. Paradis constituted "continuing torts" which would have been covered by the 2000-2001 ICRMP policy. To the contrary, all of the events alleged by Mr. Paradis arose long before the commencement of the coverage provided by the ICRMP policy, and any subsequent claims and/or damages arising therefrom cannot give rise to coverage where none existed at the time of the original occurrence, as per the Idaho Supreme Court's decision in Western Cas. As no potential for coverage under the ICRMP policy was revealed by Mr. Paradis' allegations relating to actions some two decades earlier, no duty to defend arose requiring ICRMP to provide a defense.

---

[5] At least one court has held that, although an action (for purposes of the statute of limitations) for malicious prosecution begins to accrue at the time of a favorable termination of a criminal proceeding, coverage under an insurance policy is instead triggered when damage begins to accrue – that is, with malicious prosecution, almost immediately. *See* Muller Fuel Oil Co. v. Insurance Co. of North America, 232 A.2d 168, 175 (N.J. Super. 1967)("In a claim based on malicious prosecution the damage begins to flow from the very commencement of the tortious conduct-the making of the criminal complaint."). Muller has been favorably cited in Idaho. *See* National Aviation Underwriters, Inc. v. Idaho Aviation Center, 96 Idaho 663, 670, 471 P.2d 55, 57 (1970) ("It is well settled that the time of the occurrence of an 'accident,' within the meaning of a liability indemnity policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged")

As such, plaintiff cannot be granted summary judgment on this point.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Partial Summary Judgment should be denied. Oral argument is requested.

RESPECTFULLY SUBMITTED this 12th day of December, 2006.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By _____
Donald J. Farley – Of the Firm
Bryan A. Nickels – Of the Firm
Attorneys for Defendant Northland
Insurance Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of December, 2006, I caused to be served a true copy of the foregoing DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

Phillip J. Collaer
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

___ U.S. Mail, Postage Prepaid
_X_ Hand Delivered
___ Overnight Mail
___ Telecopy

Donald J. Farley
Bryan A. Nickels

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant Northland Insurance Companies,
Properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff, vs. NORTHLAND INSURANCE COMPANIES, Defendant.	Case No. CV OC 0617112 **DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT**

COMES NOW defendant, Northland Insurance Companies (whose proper name and identity herein is Northfield Insurance Company)(hereinafter "defendant Northfield"), by and through its undersigned counsel of record, pursuant to Idaho Rule of Civil Procedure 56, and move this Court for an order dismissing plaintiffs' Complaint and Demand for Jury Trial

GV

("plaintiffs' Complaint") with prejudice, on the grounds that there are no genuine issues of material fact, and that defendant Northfield is entitled to summary judgment as a matter of law.

This motion is based upon the Memorandum in Support of Defendant Northland Insurance Companies' Motion for Summary Judgment, the Affidavit of Bryan R. Martens in Support of Motion for Summary Judgment, the Affidavit of Donald J. Farley in Suport of Defendant Northland Insurance Company's Motion for Summary Judgment, and the Affidavit of Bryan A. Nickels in Support of Defendant Northland Insurance Company's Motion for Summary Judgment, all of which are filed herewith, as well as all pleadings and papers on file in this action.

Should the Court deny defendant's Motion for Summary Judgment in whole or in part, defendant Northfield requests, as an alternative, that the Court enter an order, pursuant to Idaho Rule of Civil Procedure 56(d), specifying what facts appear without substantial controversy.

Defendant Northfield requests oral argument.

DATED this 1st day of March, 2007.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By _____
Donald J. Farley - Of the Firm
Bryan A. Nickels – Of the Firm
Attorneys for Defendant Northland
Insurance Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of March, 2007, I caused to be served a true copy of the foregoing **DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT**, by the method indicated below, and addressed to each of the following:

Phillip J. Collaer
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

___ U.S. Mail, Postage Prepaid
X Hand Delivered
___ Overnight Mail
___ Telecopy

Donald J. Farley
Bryan A. Nickels

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant Northland Insurance Companies,
Properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff,

vs.

NORTHLAND INSURANCE COMPANIES,

Defendant.

Case No. CV OC 0617112

ORDER GRANTING DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR OVERLENGTH BRIEF AND MEMORANDUM IN SUPPORT

BASED UPON written motion and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendant Northland Insurance Companies' Motion for Overlength Brief is hereby GRANTED.

IT IS SO ORDERED.

DATED this 4 day of March, 2007.

HON. DARLA WILLIAMSON
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5 day of March, 2007, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Donald J. Farley
Bryan A. Nickels
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Fax: (208) 395-8585

X U.S. Mail, Postage Prepaid
__ Hand Delivered
__ Overnight Mail
__ Telecopy

Phillip J. Collaer
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

X U.S. Mail, Postage Prepaid
__ Hand Delivered
__ Overnight Mail
__ Telecopy

Deputy Clerk

Phillip J. Collaer, ISB No. 3447
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: pcollaer@ajhlaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff,

vs.

NORTHLAND INSURANCE COMPANIES, a Minnesota corporation,

Defendant.

Case No. CV OC 0617112

PLAINTIFF'S RESPONSE TO NORTHLAND/NORTHFIELD INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT

I.

STATEMENT OF FACTS

On April 9, 2003, Donald Paradis filed a Complaint in the Federal District Court for the District of Idaho naming as defendants Kootenai County, Glen Walker, Marc Haws, Peter Erbland, and George Elliott as defendants. *See* Complaint, Exhibit A. These individuals, as well as Kootenai County, were ICRMP insureds. When the Complaint was filed, Kootenai County was insured by ICRMP. It

forwarded a copy of the Complaint to the ICRMP Claims Department. *See* Affidavit of Richard B. Ferguson, ¶3.

ICRMP, upon receiving the ***Paradis*** Complaint, forwarded a copy of the suit papers to its reinsurer, Northland/Northfield Insurance Companies. *See* Affidavit of Richard B. Ferguson, ¶3. ICRMP also reviewed the allegations in the ***Paradis*** Complaint for potential coverage. A decision was made that a duty to defend existed. Kootenai County and the other defendants were advised of this decision and provided a reservation of rights letter. *See* Complaint, Exhibit B. Northland/Northfield received a copy of the reservation of rights letter. *Id.*

Because of potential conflicts of interest, ICRMP, exercising its discretion over the management of the litigation, retained separate attorneys for Kootenai County, Mr. Haws, and Mr. Elliott. Again, Northland/Northfield was advised of this decision. Northland/Northfield did not object to this approach. *See* Affidavit of Richard B. Ferguson, ¶5.

For the next two years, the ***Paradis*** litigation developed. Northland/Northfield received regular reports from ICRMP advising it of the status of the litigation and the defense costs which were being incurred on behalf of the ICRMP insureds. *See* Affidavit of Richard B. Ferguson, ¶4. The defense that was being extended to the insureds was a complete defense of all claims in the ***Paradis*** Complaint. *Id.* Again, throughout this time, Northland/Northfield never voiced any concerns or objections that multiple law firms were being used to defend the insureds or that a complete defense was being provided. *Id.*, ¶¶4,5.

On February 13, 2006, nearly two years after the ***Paradis*** litigation commenced, Northland/Northfield advised ICRMP that it would be taking the position that coverage did not exist for any of the claims described in the ***Paradis*** Complaints. *See* Complaint, Exhibit C. Correspondence was exchanged between ICRMP and Northland/Northfield addressing the coverage issues. Through that process, Northland/Northfield was advised that the Honorable Lynn B. Winmill, the federal judge assigned to the liability case, had issued a ruling which characterized a number of the ***Paradis*** claims as continuing torts. It was ICRMP's position, at that time, that the existence of a continuing tort describing negligence, false arrest, false imprisonment, or violations of Mr. Paradis' constitutional rights described potentially covered claims which obligated ICRMP to provide a defense. *See* Complaint, Exhibit D. Northland/Northfield, through its claims handler (Eric Martensen) summarily dismissed the legal reasoning of Judge Winmill concluding that a continuing tort did not exist and, for that reason, coverage would not arise. *See* Complaint, Exhibit E.

Shortly after Northland/Northfield made the decision to deny coverage, the ongoing defense costs associated with the litigation caused ICRMP to consider the possibility of mediating a settlement. *See* Affidavit of Richard B. Ferguson, ¶8. At that point, the defense costs had reached $400,000, exceeding the self-insured retention owed by ICRMP under the Northland/Northfield policy. It was anticipated that through trial the defense costs, which would include the expenses relating to expert witnesses, would exceed $2,000,000. *Id.* In light of the considerable

exposure ICRMP faced for future defense costs, coupled with the possibility of an adverse judgment being entered against its insureds, ICRMP made the decision that mediation should be pursued. *Id.*, ¶9. Although it was not obligated to do so, ICRMP solicited Northland/Northfield's input and participation in settlement discussions and mediation. *See* Complaint, Exhibit 7. Northland/Northfield ratified its earlier breach of contract by restating its previous position that coverage did not exist and advising ICRMP it would not participate in mediation or settlement. *See* Complaint, Exhibit G.

Thereafter, the case was mediated and a favorable settlement reached. *See* Affidavit of Richard B. Ferguson, ¶11. The settlement required ICRMP to pay $800,000, which was less than the anticipated costs to litigate the case through trial. *Id.*, ¶¶9, 11. The settlement also extinguished the insureds' exposure to a claim for attorneys' fees from the attorneys who had represented Mr. Paradis through the habeas corpus litigation. The potential exposure for that aspect of the constitutional claims alone exceeded $2,000,000. *See* Affidavit of Richard B. Ferguson, ¶12.

ICRMP has, for many years, purchased reinsurance from Northland and its subsidiary Northfield. *See* Affidavit of Richard B. Ferguson, ¶2. ICRMP purchases reinsurance in order to reallocate a portion of the risk it assumes when it issues an insurance policy to an insured such as Kootenai County. *Id.*. By purchasing reinsurance, ICRMP reduces the amount of reserves it is required to maintain which allows it the financial security to issue additional insurance policies or make

investments. *Id.*

Throughout its longstanding relationship with Northland/Northfield, ICRMP has routinely provided a complete defense to its insureds when they are sued for covered and non-covered claims. *See* Affidavit of Richard B. Ferguson, ¶3. Until the ***Paradis*** litigation, Northland/Northfield has never sought to allocate its reimbursement obligation by refusing to pay for attorneys' fees expended in cases involving covered and non-covered claims. *Id.* Additionally, Northland/Northfield has never refused or attempted to allocate its reimbursement obligation relating to settlement monies paid to resolve suits where covered and non-covered claims are pled. *Id.* In all of these cases, once ICRMP's SIR is exhausted, a billing for reimbursement is presented to Northland/Northfield. That billing is paid without any request for allocation or apportionment. *Id.*

II.

INTERACTION BETWEEN THE NORTHFIELD AND ICRMP INSURANCE POLICIES

From the time of its formation and including the 2000-2001 policy year, ICRMP has purchased reinsurance from Northland Insurance Companies. Northfield Insurance Company is a subsidiary of Northland.

The Northfield policy at issue in this case identifies the named reinsured as ICRMP. The policy reads:

> **NAMED REINSURED:** ICRMP COUNTIES RISK MANAGEMETN PROGRAM, A JOINT POWERS AUTHORITY and all Boards, Departments, Divisions, Commissions, Authorities, and any other activities under the supervision or control of the J.P.A. whether now or hereafter constituted.

See Northfield Policy, Pg. 1.

The policy extends various coverages, including comprehensive general liability (Section II) and errors and omissions coverage (Section IV). The policy limits are defined at pages 2-3. Potential payments to ICRMP are described as a component of the "ultimate net loss" and are qualified by ICRMP's self-insured retention of $150,000. *See* Northfield Policy, Pg. 3. The term "ultimate net loss" is defined and includes the "total sum" ICRMP becomes obligated to pay by reason of personal injury or property damage claims either through adjudication or compromise. The definition recognizes the "total sum" owed by Northfield would include salaries, wages, law costs, expenses for lawyers and investigators, or other persons for litigation settlement, adjustment, and investigations or claims or suits. *See* Northfield Policy, Pg. 40.

The Northfield policy identifies the ICRMP claims department as the entity charged with the responsibility and duty of defending and settling all claims. *See* Northfield Policy, Pg. 5 (¶II, Service Organization). In that portion of the policy, Northfield is given the opportunity to be associated with the defense or control of any claim or suit. However, the Northland/Northfield policy does not contain language giving Northland/Northfield the right to override settlement decisions that are made by the ICRMP Claims Department. *Id.* ICRMP is also required to furnish monthly claims reports to Northfield. *Id.* Northfield is required to promptly reimburse ICRMP for any and all payments made in excess of the SIR. *See* Northfield Policy, Pg. 39.

Coverage under the comprehensive general liability insuring agreement of the Northfield policy is extended as follows:

> A – COMPREHENSIVE GENERAL LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums, including expenses, all as more fully defined by the term ultimate net loss, which the Assured shall become legally obligated to pay as damages imposed by law because of bodily injury, property damage, personal injury, advertising injury, products liability and/or completed operations, host/liquor liability or incidental malpractice which result from an occurrence and which occur during the policy period.
>
> ...
>
> C – LAW ENFORCEMENT LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums which the assured shall be obligated to pay by reason of errors, omission or negligent acts arising out of the performance of the Assured's duties while acting as a law enforcement official or officer in the regular course of public employment as hereinafter defined, arising out of any occurrence from any cause on account of Personal Injury, Bodily Injury, Property Damage, Violation of Civil Rights or First Aid, happening during the period of this insurance accept as covered under Section II A and B.

See Northfield Policy, Pg. 13.

The term "personal injury" is defined at Page 14 of the Northfield policy as follows:

> PERSONAL INJURY – The term "personal injury" wherever used herein, shall mean Bodily Injury, Mental Anguish, Shock, Sickness, Disease, Disability, Wrongful Eviction, Malicious Prosecution, Discrimination, Humiliation, Invasion of Rights of Privacy, Libel, Slander, or Defamation of Character; also Piracy and any

Infringement of Copyright or of Property, Erroneous Service of Civil Papers, Assault and Battery, Disparagement of Property, False Arrest, False Imprisonment, and Detention.

The term "occurrence" is defined at page 6 as follows:

> For Section II, "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which result in personal injury or damage to property during the policy. All personal injuries to one or more persons and/or property damage arising out of an accident or a happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

The comprehensive general liability insuring agreement in the relevant ICRMP policy contains very similar, if not identical, insuring language as appears in the Northfield policy. Under the ICRMP policy, coverage under the comprehensive general liability insuring agreement is extended as follows:

> **COVERAGE A – Comprehensive General Liability.** We agree, subject to the terms and conditions of this Coverage, to pay on your behalf those sums which you become legally obligated to pay as damages for ***personal injury*** or ***property damage*** which arise out of an ***occurrence*** during the Policy Period.
>
> ...
>
> **COVERAGE C – Law Enforcement Liability.** We agree, subject to the terms and conditions of this Coverage, to pay on your behalf all sums which you become obligated to pay by reason of errors, omissions, or negligent acts arising out of the performance of your duties while providing any law enforcement services or the administration of ***first aid*** resulting in ***personal injury*** or ***property damage*** during the Policy Period.

See ICRMP Policy, Pg. 14.

The term "occurrence" is defined at page 14, ¶8, of the ICRMP policy as follows:

> **"Occurrence"** means an ***accident*** or a continuous or repeated exposure to conditions which result in ***personal injury*** or ***property damage*** during the Policy Period. All personal injuries to one or more persons and/or ***property damage*** arising out of an ***accident*** or a continuous or repeated exposure to conditions shall be deemed one ***occurrence***.

The term "personal injury" is defined at page 15, ¶9, of the policy as follows:

> **"Personal Injury"** means ***bodily injury***, mental anguish, shock, sickness, disease, disability, wrongful eviction, malicious prosecution, discrimination, humiliation, invasion of rights or privacy, libel, slander or defamation of character, piracy and any infringement of copyright or property, erroneous service of civil papers, assault and battery and disparagement of property. As respects to **Coverage C** only, ***personal injury*** shall also mean false arrest, false imprisonment, detention and violation of civil rights arising out of law enforcement activities.

Reading the two policies together, and focusing on the general liability insuring agreements, Northfield has agreed to indemnify ICRMP, its "named reinsured", for all sums and expenses which are included in the term "ultimate net loss" which ICRMP becomes legally obligated to pay because of bodily injuries or personal injuries arising out of an occurrence during the policy period. This would extend to claims involving the violation of civil rights, malicious prosecution, humiliation, invasion of rights, privacy, defamation of character, false arrest, false imprisonment, and detention. *See* Northfield Policy, Pg. 14 (definition personal injury). Under the Northfield policy, the defendant is required to reimburse ICRMP

for "law costs" which include "expenses for lawyers and investigators and other persons for litigation, settlement, adjustment, or investigation of claims or suits". Reimbursement must occur promptly after ICRMP exhausts its self insured retention.

If one reviews the insuring agreement and definitions relating to the comprehensive general liability coverages offered by the ICRMP and the Northfield policies, it becomes very clear the insuring language is very similar, if not identical. Both policies provide coverage for "occurrences" that cause property damage or "personal injury". Both policies define "personal injury" to include violations of civil rights, malicious prosecution, defamation, false arrest, false imprisonment, and negligence. The Northfield policy specifically contemplates reimbursing ICRMP for "law costs" which are defined as costs ICRMP incurred defending potentially covered claims or settlements arising under the comprehensive general liability insuring agreement. For the purposes of this motion, the Court must determine whether a potentially covered claim existed. If it did, ICRMP is entitled to the recovery of its defense costs, as well as the settlement monies paid.

III.

DUTY TO DEFEND

In the briefing Northland/Northfield has provided this Court, the defendant has advanced an interpretation of an insurer's duty to defend that is restricted and is inconsistent with the holdings of the Idaho appellate courts and many other jurisdictions. In the memorandum in opposition to ICRMP's motion for summary

judgment, Northfield makes the generalized statement that an insurer's duty to defend is not absolute. *See* Memorandum in Opposition, Pg. 16. Other than restating the general rule that an insured must establish an affirmative link to coverages afforded by the policy, Northfield provides no other guidance for this proposition, other than the conclusion that it feels that coverage would not exist because the events surrounding Mr. Paradis' conviction took place prior to the issuance of the Northfield policies.

The Idaho Supreme Court has consistently ruled that an insurer's duty to defend and its corresponding duty to indemnity are separate obligations. *See* ***City of Idaho Falls v. Home Indemnity Co.***, 126 Idaho 404, 888 P2d. 383 (1995). The duty to defend is a separate and much broader obligation. *See* ***Hirst v. St. Paul Fire & Marine Ins. Co.***, 106 Idaho 792, 683 P2d. 440 (Ct. App. 1984). The duty to defend arises upon the filing of a complaint containing allegations that, in whole or in part, read broadly, reveals a potential for liability that would be covered by the insured's policy. *See* ***Hoyle v. Utica Mutual Ins. Co.***, 137 Idaho 367, 48 P3d. 1256 (2002). *See also* ICRMP's memorandum in support and reply memorandum in support of its motion for summary judgment.

When there are covered and non-covered claims contained in the same lawsuit, the insurer is obligated to provide a defense to the entire suit. *See* Annot., 41 A.L.R. 2d. 434 (1955). The obligation to provide a complete defense arises

pled *nolo contendre* to allegations involving child molestation. The insurer filed a declaratory judgment action alleging the actions of the teacher did not fall within the policy's coverage and were excluded as criminal or intentional acts. The trial court agreed ruling that all of the teacher's acts were either sexual or intentional in nature. On appeal, the California Supreme Court reversed noting that the allegations in the complaint "although lacking in specificity...evidences a possibility that Gary Lee [the teacher] would be held liable for damages within the coverage of the policy stemming from Lee's negligent non-sexual conduct in his public relationship with Barbara." *Id.* at 797. The court rejected the insurance company's argument that the predominant factor of the case was the non-covered criminal and intentional acts by writing:

> The argument misconceives the role of the court in determining the duty to defend. We look not to whether non-covered acts predominate in the third party's action, but rather to where there is *any* potential for liability under the policy (***Gray, supra***, 65 Cal. 2d. at pgs. 275-276). Since the insurer has a duty to defend the entire third party action if any claim encompassed within it potentially may be covered (absent allocation, as noted above), the mere fact that Horace Mann could not indemnify Lee for the molestation did not eliminate its duty to defend other possibly covered claims.

Id. at 797-798 (emphasis in original).

The holdings of the California Supreme Court in ***Horace Mann*** are consistent with ***Hirst v. St. Paul Fire & Marine Ins. Co.***, 106 Idaho 792, 683 P2d. at 440 (Ct. App. 1984). In ***Hirst***, the insured (Dr. Donohue) was sued for allegedly drugging his patient, who was a minor, and performing sexual acts upon the child against his

will. The insurer refused to defend on the grounds the allegations of sexual misconduct did not involve covered claims. When the coverage issue reached the Court of Appeals, the court concluded that St. Paul had breached its duty to defend the doctor. The court specifically found that the original complaint alleged the doctor had "committed various acts of negligence and professional malpractice". The court recognized that although the allegations of negligence and professional malpractice were later determined to not be supported by the record, they did describe claims broad enough to include potential liability for a covered claim which triggered St. Paul's duty to defend. The fact the original complaint also contained non-covered claims arising from the allegations of sexual molestation did not diminish the insurer's obligation to defend the entire suit.

Although an insurer must defend all claims in a suit, it is generally recognized that it may withdraw the defense once there is no longer any potential future liability for a covered claim. *See* ***Lee v. Aetna Casualty & Surety Co.***, 178 F2d. 750 (2nd Cir. 1949). The timing of a withdrawl was explained by the Minnesota Supreme Court in ***Meadowbrook v. Tower Ins. Co., Inc.***, 559 NW2d. 411 (1997) where the court wrote:

> Although we have concluded that insurers may withdraw from a defense once all arguably covered claims have been dismissed, we must determine at what point the dismissal of the defamation claims became final. An insurer's duty to defend claims arguably within the policy's coverage extends until it can be concluded as a *matter of law* that there is no basis on which the insurer may be obligated to indemnify the insured. ***Woida v. North Star Mut. Ins. Co.***, 306 NW2d. 570, 574 (Minn. 1981). As a result, the duty to defend extends through

> the appellate process. *See* ***F.A. Appleman Ins. Law and Practice, Section 4688 at 200*** (Burdall Ed. 1979) (the insurer's obligation to defend the suit against the insured does not end with a successful verdict in the trial court, but includes the defense of any appeals that the claimant may make). *See also* ***City of West Haven v. Commercial Union Ins. Co.***, 894 F2d. 540, 545-46 (2d. Cir. 1990).

See 559 NW2d at 418 (emphasis in original). *See also* ***Commerce & Industry Ins. Co. v. Bank of Hawaii***, 73 Hawaii 322, 832 P2d. 733 (1992) (insurer may not withdraw from its insured's defense until a final judgment has disposed of the covered claims).

Applying these principles to the present case, the Court must examine the legal and factual allegations in the complaints filed by Donald Paradis, treat them as being factually true, and compare those allegations against the coverages in the ICRMP and Northfield policies to determine whether they described potentially covered claims. *See* ***Hoyle***, 137 Idaho at 372-372. If there is a single allegation in the ***Paradis*** complaints which described a potentially covered claim, ICRMP was obligated to defend the entire lawsuit, including the non-covered claims. The obligation to defend continued until all covered claims were dismissed and any potential appeal had expired. As outlined below, the ***Paradis*** complaint describes a number of potentially covered claims which required ICRMP to defend the entire lawsuit.

IV.

THE COMPLAINTS FILED BY DONALD PARADIS DESCRIBE POTENTIALLY COVERED CLAIMS

In the memorandum filed in support of its motion for summary judgment, ICRMP outlined the allegations in the first ***Paradis*** complaint that described potentially covered claims. *See* Memorandum in Support, Pgs. 7-8. These claims alleged that Mr. Paradis' civil rights were violated when he was convicted of the murder of Kimberly Palmer. Paradis also alleged the ICRMP insureds continued to violate his civil rights for the many years following his conviction. *See* ***Paradis*** Complaint, ¶68. The alleged ongoing civil rights violations surrounded the contention that exculpatory evidence was withheld during the time Paradis was in prison challenging his conviction through various habeas corpus proceedings. *Id.* Paradis further alleged this course of illegal conduct constituted negligence, false arrest, malicious prosecution, and false imprisonment. *See* ***Paradis*** Complaint, Counts IV and V. Finally, Mr. Paradis alleged that defendant Haws made a negligence choice to withhold evidence and thereafter continue his secrecy after Paradis was convicted and incarcerated. *See* ***Paradis*** Complaint, ¶118. Paradis also alleged that Haws made untrue statements to the press up to the time he was released from prison. *See* ***Paradis*** Complaint, ¶22.

These allegations described potentially covered claims under both the Northfield and ICRMP definitions of "personal injury". In both policies, personal injury is defined to include emotional distress or mental anguish caused by negligence, false arrest, false imprisonment, violations of civil rights, defamation,

and invasion of privacy. *See* Northfield Policy, Pg. 14; ICRMP Policy, Pg. 15, ¶9. The only question is whether the ***Paradis*** Complaint alleged that any of these constitutional violations or torts occurred during the time Northfield was providing reinsurance to ICRMP.

The First Amended Complaint was filed by Mr. Paradis following the resolution of various motions to dismiss filed by the ICRMP insureds. In his order resolving these motions, Judge Winmill concluded that the claims for false arrest, false imprisonment, and intentional infliction of emotional distress accrued on April 10, 2001, the date Mr. Paradis was released from prison. *See* Order, Pg. 45. The judge based his ruling on ***Curtis v. Firth***, 123 Idaho 598, 850 P2d. 749 (1993) writing:

> The longer statute of limitations for a false arrest/false imprisonment cause of action is distinguishable from the defamation claim in ***Lewis v. Gupta***, because false arrest/false imprisonment, unlike defamation, is deemed a "continuing tort".

See Opinion, Pg. 44, N. 17

The Court did not address the negligent training or negligent supervision claims against Kootenai County noting that Paradis had alleged a pattern and practice of permitting ***Brady v. Maryland*** violations and other wrongful acts in the context of his civil rights claims. However, because of a lack of clarity in these allegations, rather than grant the County's Motion to Dismiss on immunity or statute of limitations grounds, the Court directed Paradis to amend the Complaint to clarify his claims. *See* Order, Pgs. 48-49.

After Judge Winmill ruled on the Motions to Dismiss, Mr. Paradis filed the First Amended Complaint. In the Amended Complaint, he restated his claims for civil rights violations, and claims for false arrest, false imprisonment, malicious prosecution, negligence, negligent infliction of emotional distress, and defamation. Throughout the Amended Complaint Paradis very carefully described his claims as continuing torts. The relevant portions of the Amended Complaint state:

> 92. The duty to disclose and the duty to train in the requirements of disclosing exculpatory evidence to criminal convicts under ***Brady*** is a continuing duty and does not cease with the conviction and incarceration of the criminal defendant.
>
> ...
>
> 97. Despite the requirements of the ***Brady*** doctrine and the known implications of such requirements affecting the rights of criminal defendants and the duties and activities of law enforcement personnel, in 1980 and 1981 – and indeed, continuing for years thereafter ... the customs, policies and practices of Kootenai County, particularly its prosecuting attorney and sheriff, displayed and reflected a deliberate indifference to and conscious disregard for the constitutional rights of criminal defendants generally, and the plaintiff in particular.
>
> 98. Defendants Kootenai County and Walker, respectively, failed to provide Kootenai County police officers and prosecuting attorneys with adequate training or supervision in the requirements of ***Brady v. Maryland*** and the disclosure of exculpatory evidence.

See First Amended Complaint, ¶¶92-98 (emphasis added).

The state law negligence claims incorporated the continuing tort allegations and alleged an ongoing pattern and practice of negligent training and supervision. *See* Amended Complaint, Count VII. Finally, at Count X, Paradis alleged ongoing

and continuing negligence on the part of Mr. Haws surrounding his alleged failure to disclose evidence which would have exonerated Paradis. These allegations were not limited to the criminal trial. Instead, according to Paradis, Haws continued to conceal evidence while he was in prison attempting to challenge his conviction through the appellate and habeas corpus litigation. *See* Count X, ¶188. The fact the Paradis claims extended to his incarceration is highlighted by the allegations in ¶190 of the First Amended Complaint which states: "In fact, Plaintiff Paradis was scheduled for execution on three different occasions when Haws continued to conceal his notes and knowledge."

These allegations, as with the first Complaint, described potentially covered claims under the definition of "personal injury" in both the Northfield and ICRMP policies. The Amended Complaint also, unambiguously, alleged ongoing tortious and unconstitutional conduct on the part of the ICRMP insureds occurring after Mr. Paradis was incarcerated which continued until he was released from prison in April of 2001. The legal question, for purposes of coverage, is whether the allegation of continuing torts and continuing violations of civil rights describe an "occurrence" as that term is defined in both the ICRMP and Northfield policies.

A. The Amended Complaint describes an occurrence which caused personal injury during the Northfield and ICRMP policy periods.

In its motion, Northfield argues it is not obligated to reimburse or indemnify ICRMP for any costs relating to the defense or settlement of the ***Paradis*** litigation. To support its position, Northfield argues that all of the constitutional and state law claims were limited to the events surrounding Mr. Paradis' arrest in 1980 and his

conviction in 1981. *See* Defendant's Brief, Pg. 22. Northfield argues that because the arrest and conviction took place in the early 1980's, the "occurrence", which is the trigger for coverage under the general liability section of both the Northfield and ICRMP policies, took place no later than 1981. *See* Defendant's Brief, Pg. 25. Northfield then argues coverage would not attach to damages that were caused by the events that occurred in 1980 and 1981. *Id.*

The flaw in this argument is Northfield's failure to consider the actual allegations contained in the ***Paradis*** Complaints. As outlined in Section III, *supra*, an insurer's duty to defend is determined solely by the factual allegations and legal theories pled in the liability complaint. *See* ***Hoyle*** at 371-372; *see also* ***Amco Ins. Co. v. Tri Spur Investment Co.***, 140 Idaho 733, 738, 101 P2d. 226, 231 (2004). Those allegations must be read broadly, assumed to be true, and then compared against the coverages available in the insurance policy. Extrinsic facts or unpled legal theories cannot be considered to create or defeat an insurer's duty to defend. *See* ***Hoyle*** at 373. If the allegations in the Complaint, read broadly, create a potential for coverage, an insurer must provide a defense. *Id.*.

The Amended Complaint filed by Mr. Paradis specifically alleged that the ICRMP insureds were obligated to disclose exculpatory evidence after the time he was convicted. *See* Amended Complaint, ¶92. The Amended Complaint also alleges this was a continuing duty that was breached during the time Paradis was incarcerated. *Id.* at ¶¶97-98. Paradis further alleged these continued violations of state and federal law caused him to suffer additional damages which did not end

until he was released from prison. *See* Amended Complaint, ¶¶101, 139, 180, 198, 211, 214. These allegations, as they apply to the constitutional and the state law claims for false imprisonment and false arrest were recognized by Judge Winmill in the underlying liability case to be continuing torts. *See* Opinion, Pg. 44, N. 17. Contrary to the argument of Northfield, Mr. Paradis did not allege the tortious actions of the ICRMP insureds ended when he was convicted. Instead, Paradis alleged the ICRMP insureds continued to breach their legal duties and, as a result, he continued to suffer damage throughout his incarceration.

A continuing tort was described by the Idaho Supreme Court in ***Curtis v. Firth***, 123 Idaho 598, 850 P2d. 749 (1993) as involving "...a series of acts over a period of time, rather than a single act causing severe emotional distress." *Id.* at 604 . A plain reading of the allegations in the amended liability complaint reveals Mr. Paradis was alleging the ICRMP insureds engaged in a series of acts over a period of time, rather than a single act (his conviction), which caused him severe emotional distress. On that basis, the coverage issue must be resolved by asking whether the fact a continuing tort which began in 1980 and ended in April of 2001 would meet the definition of an occurrence as that term appears in the Northfield and ICRMP insurance policies.

1. Continuing torts are "occurrences" as the term is defined in a general liability insuring agreement.

The Northfield policy defines an occurrence as "...an accident or a happening or event or a continuous or repeated exposure to conditions which result in personal injury or damage to property during the policy period." The definition

further states that damages arising out of a continued or repeated exposure will be deemed a single occurrence. *See* Northfield Policy, Pg. 6. The definition of "occurrence" in the ICRMP policy is nearly identical to the definition utilized in the Northfield policy. *See* ICRMP Policy, Pg. 14, ¶8. The two policies are therefore consistent and afford the same coverage. The plain language of this definition clearly contemplates coverage will extend to continuing torts. A "continuous or repeated exposure to conditions", i.e. ongoing tortious conduct, is consistent with the standard for a continuing tort set forth in ***Curtis v. Firth***, ***supra***, where the court held the continuing tort involves a "series of acts over a period of time". Clearly, a continuing tort would constitute an occurrence under the Northfield and ICRMP policies.

In ***Wisconsin Electric Power Co. v. California Union Ins. Co.***, 142 Wis. 2d. 673, 419 NW2d. 255 (1987) the insured, Wisconsin Electric Power Company (WEPCo) installed a three-phase power supply to the dairy farm of the plaintiff, Daggett. Shortly after its installation, the Daggetts noticed unusual behavior on the part of their cows which resulted in a decline in milk production, failure to breed, ill health, and sometimes death. In 1981, eleven years after the power supply was installed, it was determined the damages to the plaintiff's cattle were caused by stray voltage from the three-phase power supply installed by WEPCo. Suit was filed in 1983 seeking to recover the damage caused to the Daggetts' cows. At trial, the jury awarded damages in excess of $1,000,000. Before judgment was entered, WEPCo and the plaintiffs entered into a settlement whereby

the power company agreed to pay slightly more than $1,000,000 over a period of years. WEPCo's insurance carriers, including Cal Union, approved of the settlement. Thereafter, WEPCo and the insurers entered into discussions aimed to allocate the loss. A compromise was reached to allocate on a pro rata basis. Cal Union would not agree to the compromise because it felt it was not obligated to provide coverage or indemnity to WEPCo. This position was based upon the fact that Cal Union did not issue an insurance contract to WEPCo until 1977, seven years after the defective three-phase power supply had been installed. On that basis, Cal Union argued an occurrence had not happened during the policy period.

The Wisconsin Supreme Court rejected this argument writing:

> We agree with the reasoning of the ***Keene*** decision. Cal Union's policy states "[t]he word "occurrence" ... means ... a continuous or repeated exposure to conditions which result in ... property damage neither expected or intended by the assured. All ... exposure to ... the same general conditions existing and/or emanating from one location or source shall be deemed one occurrence. A perfectly reasonable interpretation of this language, and the interpretation advance by WEPCO, is that as long as there is harmful exposure to dangerous conditions, the occurrence is continuing. As in ***Keene***, while any part of the single injurious process continues, the occurrence continues.

See 4019 NW2d. at 681.

In the ***Wisconsin Electric Power Co.*** case, the tortious act, the continuing stray voltage, was ongoing from the time the power supply was installed until the insured, WEPCo, corrected the problem. In other words, WEPCo continued to engage in tortious activity which continued to expose the plaintiff's cattle to stray

voltage causing the plaintiff to suffer ongoing property damage over an eleven-year period. Because of the continuing nature of the tort, tortious activity did occur during the time WEPCo was insured by Cal Union. For that reason, the allegations against WEPCo described an occurrence as defined by the insurance policy. *See also* ***County of Suffolk v. Travelers Ins. Co.***, 267 F. Supp. 2d. 288 (E.D. N.Y. 2003) (a continuing nuisance claim triggers the duty to indemnify and defend under a comprehensive general liability policy defining an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in bodily or property damage neither expected or intended from the standpoint of the [county]").

The affect of a continuing tort in the context of a claim brought under 42 U.S.C. §1983 was recognized by the Ninth Circuit Court of Appeals in ***Williams v. Owens-Illinois, Inc.***, 665 F2d. 918, 924 (9th Cir.) cert. denied. 459 U.S. 971 (1982). The court characterized the ongoing illegal actions of the defendant as a continuing violation which arose in the context of a continuing policy and practice of discrimination. To prevail under a continuing violation theory, the plaintiff was required to show a policy or practice that operated at least, in part, within the statute of limitations time period.

In this case, according to Mr. Paradis, the ICRMP insureds continued to engage in unconstitutional and tortious activities surrounding the withholding of exculpatory evidence and failing to supervise employees long after he was incarcerated. According to Paradis, this tortious activity continued until he was

released from prison. These allegations describe a continuing tort and a continuing constitutional violation which would meet the definition of an occurrence as defined by the Northfield insurance policy. Based upon the allegations in the ***Paradis*** Complaint, the entire pattern of tortious activity from 1980 until Mr. Paradis was released from prison constituted a single occurrence. Because the occurrence took place, in part, during the Northfield policy period, coverage exists.

In ***Unigard Ins. Co. v. USF&G***, 111 Idaho 891,728 P2d 780 (Ct. App. 1986), the court was asked to decide whether a series of repetitive events causing multiple incidences of damage could constitute a single occurrence under a general liability insurance policy. The case involved damage caused to various units at a mini storage facility located in Pocatello, Idaho. The insured's employee performed snow clearing services at the property. During a four-hour period where the employee was plowing snow, he damaged the overhead doors on 98 separate storage units. The insurance company took the position that each damaged door was the result of a separate occurrence which triggered a separate $500 deductible for each event. Because of the amount of damage to each door was less than the $500 deductible, Unigard refused to pay.

On appeal, the court recognized the various approaches taken by courts in cases involving multiple occurrences. The court concluded the most useful approach has been the "continuous process" test which focuses upon the underlying cause rather than the individual events damage. The critical inquiry was described as being whether or not the damage causing process was continuous and

repetitive. *See* 111 Idaho at 893. This caused the court to write:

> The question remains whether the damage was caused by a single occurrence. We hold that it was. The cause of damage – the negligence of Campbell's employee – was continuous and repetitive. He inflicted 98 similar injuries during the four-hour course of snow clearing activity. Under the continuous process test, there was but one "occurrence". Campbell was responsible for only one deductible. *See* 111 Idaho at 894.

The fact the Idaho courts have adopted the continuous process analysis is critical in this case. It is consistent with the holdings in ***Keene Corp. v. Ins. Co. of North America***, 667 F2d. 1034 (D.C. Cir. 1981) cert. denied. 455 U.S. 1007 (1982) involving asbestos litigation. In that case, the court concluded that the asbestos exposure and resultant disease was a continuous process which constituted a single occurrence triggering coverage on all liability policies which were in place throughout the occurrence. The court concluded that once the insurer's policy was triggered, it was required to defend and indemnify its policyholder to the extent of its entire policy limits even though part of the injury may have occurred outside its policy period.

A similar analysis was utilized in ***Dioceses of Winona v. Interstate Fire & Casualty Co.***, 89 F3d. 1386 (8th Cir. 1996) involving longstanding and repeated sexual abuse by a pedophilic priest. The Dioceses was sued for its negligent supervision of the priest. The abuse of the plaintiff began in October of 1979 and continued until February of 1987. The court described the occurrence as "the continuous and repeated exposure of Mrozka [liability plaintiff] to the negligent supervision of Father Adamson by both the Diocese and the Archdiocese. Because

the negligence of the insured took place, at least in part, during the policy period causing the plaintiff to suffer injury, coverage existed.

A similar conclusion was reached in ***National Casualty Ins. Co. v. City of Mt. Vernon,*** 128 AD2d. 332, 515 NYS2d. 267 (1987) involving a claim for false imprisonment where the plaintiff was wrongfully incarcerated for two years. The insurer refused to defend the action arguing the arrest occurred before the effective date of the policy. This argument was rejected with the court writing:

> Contrary to National's contentions, the language of the occurrence clause herein ascribes no temporal relevance to the cause of the event preceding the covered injury, but rather premises coverage exclusively upon the sustaining of specified injuries during the policy period. Thus, the pertinent policy provision provides coverage for an "occurrence" and, thereafter, states that an occurrence means "an event ... which results in personal injury ... *sustained during the policy period* ." (emphasis added). Indeed, as one commentator has stated in discussing a similar provision, "[the] policy will not depend upon the cause of event of occurrence, but will be based upon the injuries or damage which result from such an event and which happened during the policy period. It will not be material where the cause of the event happened during "before the policy period". ***Obriest, New Comprehensive Liability Insurance Policy, General Liability Insurance:*** *1973 Revisions at 39; see also* ***Appalachian Ins. Co. v. Liberty Mut. Ins. Co.***, 676 F2d. 56, 61-62; ***Bartholomew v. Ins. Co. of North America***, 502 F. Supp. 246, 252 aff'd ***Bartholomew v. Appalachian Ins. Co.***, 655 F2d. 27; ***American Motorists Ins. Co. v. Squibb & Sons, Inc.***, 95 Misc. 2d. 222; ***Deodato v. Hartford Ins. Co.***, 143 NJ, super, 396, 363 A2d. 361 affirmed 154 NJ supra 263, 81 A2d. 354; ***Acorn Ponds v. Hartford Ins. Co.***, 105 A2d. 723, 724; Annot. 27 ALR 4th 382). We note, moreover, that there is nothing in the policy which requires, as a prerequisite to ascertain whether there is coverage, that the injury resulting from a causative event be reduced to a single or

> fixed occurrence in time. Nor does the policy distinguish, in terms of coverage, between compensable injuries which are continuous in nature and those whose occurrence is discrete and noncontinuous or requires that a personal injury take place in its entirety during the policy period. These omissions are particularly significant in that the policy specifically recognizes that an injury can be caused by "continuous or repeated exposure to conditions" (*see* ***Keene Corp. v. Insurance Co.***, 667 F2d. 1034, 1049, *cert denied*, 455 U.S. 1007). Accordingly, the operating event triggering the exposure, and thus resulting in coverage under the policy, is the sustaining of a specified injury during the policy period.

See 515 NYS2d. at 270.

In this case, the allegations in the ***Paradis*** Complaints described continuing and repeated events surrounding Mr. Paradis' conviction and subsequent incarceration all of which caused him to suffer personal injuries throughout the time he was incarcerated. Consistent with the Idaho Supreme Court's holding in ***Unigard Ins. Co.***, this continuing process describes a single occurrence which began in 1980 and ended in April of 2001 when Paradis was released from prison. As alleged by Mr. Paradis, the occurrence was ongoing and he was suffering bodily injuries during the ICRMP and Northfield policy periods. For that reason, a potential for coverage arose. ICRMP recognized this fact, honored its obligation to defend its insureds, and is now entitled to reimbursement from its reinsurer, Northfield. Accordingly, Northland's Motion for Summary Judgment should be denied.

V.

THE NORTHFIELD POLICY IS A POLICY OF REINSURANCE

In its brief, Northfield argues the policy of insurance it sold to ICRMP was

not reinsurance. It bases this argument on the lack of a "follow the form" or a "follow the fortunes" clause in the policy. *See* Memorandum in Support of Summary Judgment, Pgs. 47-49.

The initial flaw in this argument is the fact the Northfield policy unambiguously describes its relationship with ICRMP as being based upon reinsurance. On the first page of the policy, Northfield identifies ICRMP as:

> **NAMED REINSURED:** IDAHO COUNTIES RISK MANAGEMENT PROGRAM, a JOINT POWERS AUTHORITY, and all Boards, Departments, Divisions, Commissions, Authorities, and any other activities under the supervision or control of the JPA whether now or hereafter constituted.

See Northfield Policy, Pg. 1.

To the extent Northfield is now suggesting ICRMP is not its reinsured, it has conceded its policy is ambiguous as, it has shown the policy is subject to more than one interpretation. *See* ***Purdy v. Farmers Ins. Co. of Idaho***, 138 Idaho 443, 65 P3d. 184 (2003). Any ambiguity must be strictly construed against Northfield and in favor of its assured, ICRMP. *See* ***Farmers Inc. Co. v. Talbot***, 133 Idaho 428, 987 P2d. 1043 (1999); ***Foremost Ins. Co. v. Putzier***, 102 Idaho 138, 627 P2d. 317 (1981) ("...insurance policies are to be construed most liberally in favor of recovery, with all ambiguities being resolved in favor of the insured").

Northfield's argument also fails to appreciate the purpose of reinsurance and fails to recognize its policy accomplishes the traditional goals of reinsurance. The Northfield policy accepts a substantial portion of the risk ICRMP assumed when it underwrote the policy that was issued to Kootenai County and its other insureds.

Purchasing reinsurance insulates ICRMP from exposure for a large loss, allows it to lower its reserves and be financially capable of writing other insurance policies or making investments. *See* Affidavit of Richard B. Ferguson, ¶2.

Reinsurance is a contractual arrangement whereby one insurer transfers all or a portion of the risk it underwrites by purchasing an insurance policy from another insurer. *See* ***Colonial American Life Ins. v. Commissioner of Internal Revenue***, 491 U.S. 244 (1989). The purpose of reinsurance is its function as a mechanism for the reallocation of risk from the insurer that originally underwrites a risk to another insurer. ***Kemper Reinsurance Co. v. Corcoran (In re Midland Ins. Co.)***, 79 NY2d. 253, 590 NE2d. 1186 (1992). The availability of reinsurance enables an insurer, such as ICRMP, to accept risks that would otherwise be beyond its underwriting capacity by allowing it to "lay off" on a reinsurer a portion of the risk of loss. On that basis, reinsurance enables insurers to spread the risk of catastrophic losses among a larger pool of insurers. *See* ***Excess and Casualty Reinsurance Assoc. v. Ins. Commissioner of Cal.***, 656 F2d. 491 (9th Cir. 1981). Reinsurance also permits an insurer to reduce the amount of reserves it would otherwise be required to maintain. ***Kemper Reinsurance Co. v. Corcoran (in re Midland Ins. Co.)***, 79 NY3d. 253, 582 NYS 58, 590 NE2d. 1188 (1992) (reinsurance "permits a primary insurer to reduce the amount of the legally required reserve held for the protection of policyholders and to increase the company's ability to underwrite other policies or make other investments).

Under an indemnity reinsurance agreement, once the ceding insurer pays a claim, the reinsurer becomes obligated to indemnify the ceding insurer in accordance with the reinsurance contract. *See* ***China Union Lines, Ltd. v. American Marine Underwriters, Inc.***, 755 F2d. 26 (2nd Cir. 1985). The reinsurer is not obligated to pay for losses that are not covered by the underlying policy. *See* ***American Ins. Co. v. North American Company for Property and Casualty Ins.***, 697 F2d. 79 (2nd Cir. 1982). However, a reinsurer cannot second guess the good faith liability determinations made by its reinsured or the reinsured's good faith decision to waive defenses to which it may be entitled. ***Christiania General Ins. Corp. v. Great American Ins. Co.***, 979 F2d. 268 (2nd Cir. 1992). The "follow the fortunes" doctrine will compel the reinsurer "to indemnify for payments reasonably within the terms of the original [underlying] policy, even if technically not covered by it." *Id.* at 280.

A. Follow the form clauses

Excess insurers and reinsurers typically agree to provide coverage under the same terms and conditions of the underlying liability policy. In order to assure consistency or what is termed "concurrency" between the coverages afforded by the primary and reinsured policy, the reinsurance certificate frequently contains language which is referred to as a "following the form" clause. In that instance, the reinsurance contract is construed as offering the same terms, conditions and scope of coverage as exist in the reinsured policy in the absence of explicit

language in the policy of reinsurance to the contrary. *See* ***Aetna Casualty & Surety Co. v. Home Ins. Co.***, 822 F. Supp. 1328, 1337 (S.D. N.Y. 1995).

The fact a follow the form clause does not exist in the Northfield policy does not lead to the conclusion that the policy is not one of reinsurance or that the coverages in the Northfield policy are not the same as those provided in the ICRMP policy. Here, as outlined in Section II, above, the insuring language in the general liability insuring agreements in the Northfield and ICRMP policies utilize very similar language. Despite the fact the Northfield policy does not contain a follow the form clause, the defendant has, by virtue of the fact it utilized nearly identical language to that which appears in the ICRMP policy, achieved concurrency which is the purpose of including a follow the forms clause in a reinsurance certificate. Northfield's attempt to characterize the policy as something other than reinsurance because it does not contain a follow the form clause ignores the plain language of coverages afforded by its own policy. The ICRMP and Northfield policies offer the same coverages which has allowed ICRMP to reallocate a portion of its risk under the policy it sold to Kootenai County to Northfield. In other words, Northfield has reinsured the original risks ICRMP assumed when it wrote the policy Kootenai County later purchased.

B. Follow the fortunes doctrine.

Contrary to the argument of Northfield, the obligation of a reinsurer to honor the good faith settlements of its reinsured is not dependent upon the existence of a

"follow the fortunes" or "follow the settlements" clauses. To the contrary, the "follow the fortunes" doctrine arises by operation of law even in the absence of a "loss settlements" clause in the reinsurance contract. This rule was addressed in ***Aetna Casualty & Surety Co. v. Home Ins. Co.***, 882 F. Supp. 1328 (S.D. N.Y. 1995) in a case that arose out of the Dalcon Shield litigation. In the subsequent dispute between the primary insurer, Aetna, and its reinsurer, The Home, the court described the follow the fortunes doctrine as follows:

> The purpose of the follow the settlements doctrine is to prevent the reinsurer from "second guessing" the settlement decisions of the ceding company. Absent such a rule, an insurance company would be obligated to litigate coverage disputes with its insured before paying any claims, lest it first settle and pay a claim, only to risk losing the benefit of reinsurance coverage when the reinsurer raises in court the same policy defenses that the original insurer might have raised against its insured. *See* ***New York Marine Ins. Co. v. Protection Ins. Co.***, 18 F. Cas. 160, 160-61 (CC Mass. 1841) (Story, J.). This doctrine adjusts the incentives present in the reinsurance relationship in order to promote good faith settlements by the ceding company.

See 882 F. Supp. at 1346.

As noted by the Second Circuit Court of Appeals in ***Bellefonte Reinsurance Co. v. North American Company for Property and Casualty Ins.***, 903 F2d. 910 (2nd Cir. 1990) the "follow the fortunes" doctrine "...burdens the reinsurer with those risks which the direct insurer bears under the direct insurer's policy covering the original insured." *Id.* at 912. Finally, in ***Mentor Ins. Co. v. Norges Brannkasse***, 996 F2d. 506, 517 (2nd Cir. 1993), the court wrote:

> The follow the fortunes [or follow the settlements] principal does not change the reinsurance contract; it simply requires payment where the cedent's good-faith payment is at least arguably within the scope of the insurance coverage that was reinsured.

Applying these principals, the ***Aetna Casualty & Surety Co. v. The Home Ins. Co.*** court concluded that the "follow the fortunes" doctrine applied in all contracts of reinsurance even in the absence of an explicit "loss settlements" clause writing:

> The weight of authority appears to favor Aetna's position, although the authorities admittedly do not speak with one voice. For example, *Geranthewohl* opines that the "fundamental follow-the-fortunes principal" generally applies irrespective of whether it is expressed in the contract of insurance, i.e. in a loss settlement clause. *See* ***Geranthewohl, supra***, §2.5.1 at 466. *See also* ***Henry T. Kramer, The Nature of Reinsurance, in Reinsurance 11-12 (Strain ed. 1980)*** (duty to follow fortunes "may or may not be expressed in an agreement of reinsurance but nevertheless exists for all").

See 882 F. Supp. at 1349. *See also* ***International Surplus Ins. v. Underwriters at Lloyd***, 68 F. Supp. 917, 920 (S.D. Oh. 1994) (reinsurer bound by the "follow the fortunes" doctrine even in the absence of explicit language in the reinsurance contract).

The obligation that Northland/Northfield honor the good faith settlement or defense decisions entered into by ICRMP is consistent with the provisions in the Northfield policy. At page 5 of the policy, the ICRMP Claims Department is charged with the responsibility of servicing all claims under the policy. The following duties are assigned to ICRMP:

> It is understood that all claims under this policy shall be serviced by I.C.R.M.P.'s Claims Department who shall perform the following duties:
>
> A. Investigate and settle or defend all claims or losses – it is understood that, when so requested, the I.C.R.M.P. Claims Department will afford Underwriters an opportunity to be associated with them in the defense or control of any claim, suit or proceeding."

See Northfield Policy, Pg. 5 (emphasis added).

The duties given ICRMP by this language are broad and mandatory. It requires ICRMP make decisions regarding the defense and settlement of claims. While Northfield is given the "opportunity to be associated", the policy does not give it the right to second guess, after the fact, decisions made by ICRMP's Claims Department concerning whether to settle a claim or how to conduct the defense. Its right to be associated with the settlement process envisions that Northfield would have a voice in the decision, but would not have the ability to veto settlement decisions. The Northfield policy does not simply give ICRMP the choice of managing the claims, it states ICRMP "shall perform the following duties" which it then identifies as the investigation, settlement or defense of claims. Finally, and most important, the language in the Northfield policy is not attempting to identify who would have the obligation to manage claims insured solely by the ICRMP policy. Instead, the above quoted language is referring to the management and settlement of claims insured by the Northfield policy. This language unambiguously empowers the ICRMP Claims Department to bind Northfield on issues concerning the defense and settlement claims. In application, this policy language requires

Northfield to "follow the fortunes" of reasonable settlement decisions made by the ICRMP Claims Department.

In the present case, Northfield, like any other reinsurer, is bound by the good faith settlements of its reinsured, ICRMP. Under the "follow the fortunes" doctrine, so long as the settlement between ICRMP and Donald Paradis was undertaken in good faith after a reasonable investigation and was, at least arguably, with in the scope of the coverage that was reinsured, Northfield must honor its obligation to indemnify ICRMP in accordance with the reinsurance policy.

As an alternative argument, Northfield appears to suggest it is not obligated to reimburse or indemnify ICRMP for litigation costs associated with the defense of any non-covered claims. Initially, it must be noted that throughout the many years that ICRMP has purchased reinsurance from Northfield, the defendant has never attempted to apportion its reimbursement of litigation costs based upon a decision by ICRMP to provide a complete defense to a suit involving covered and non-covered claims. *See* Affidavit of Richard B. Ferguson, §3. As outlined in Section II, above, it is a well-established legal principal that when a casualty insurer's duty to defend arises, it is required to defend all claims in the liability complaint including non-covered claims. Throughout the relationship which has existed between ICRMP and Northland/Northfield, ICRMP has, on many occasions, honored this obligation and extended a complete defense to its insureds under a reservation of rights. *See* Affidavit of Richard B. Ferguson, ¶3. Throughout its relationship with

Northland/Northfield, as in the present case, ICRMP provided the defendant routine reports whereby it was apprised of the status of the litigation and the costs which are being incurred. *Id.*, ¶3. When a case was resolved, assuming the SIR was exhausted, Northland/Northfield was presented a bill for reimbursement which has always been paid without any question of whether the defense costs that were being reimbursed applied to non-covered claims. *Id.* at 3. In this case, Northland/Northfield was advised at the beginning of the ***Paradis*** litigation that ICRMP would extend a complete defense pursuant to a reservation of rights. *See* Complaint, Exhibit B; *see also* Affidavit of Richard B. Ferguson, ¶¶4, 5. Northland/Northfield expressed no objections and did not take any position on coverage until February 13, 2006, nearly two years after the ***Paradis*** Complaint was filed. *See* Complaint, Exhibit C.

This course of dealing is consistent with the general principals of reinsurance which requires the reinsurer to indemnify and reimburse the ceding company, such as ICRMP, for settlements and defense costs. *See* ***North River Ins. Co. v. CIGNA Reinsurance Co.***, 52 F3d. 1194 (3rd Cir. 1995) (reinsurer obligated to reimburse for defense costs that were reasonably within the scope of the original policy's coverage). It is also consistent with the language in the Northfield policy that vests the ICRMP Claims Department with the discretion and obligation to manage and settle claims. *See* Northfield Policy, Pg. 5 (II Service Organization).

Reimbursement for costs associated with providing a complete defense is also required by the express language in the Northfield policy. Under the comprehensive general liability insuring agreement, Northfield agrees to "...indemnify the assured [ICRMP] for all sums, including expenses, all as more fully defined by the term ultimate net loss, which the assured [ICRMP] shall become legally obligated to pay as damages imposed by law..." (emphasis added). The Northfield policy further defines ultimate net loss to include reimbursement for "...expenses for lawyers and investigators of claims or suits..." (emphasis added). As outlined above, an insurer becomes legally obligated to incur defense costs when a liability complaint or suit is filed against its insured which contains allegations describing a potentially covered claim. *See* Section II, *supra*. At that point, the insurer is obligated to defend the entire suit including covered and non-covered claims. Under the plain language of the Northfield policy, ICRMP became legally obligated to pay for "law costs" incurred by the insureds when Mr. Paradis filed complaints which described potentially covered claims. Northfield did not include any language in its policy allowing it to apportion its obligation to reimburse for defense costs which were properly incurred in defending the entire suit. *See* ***American Nat. Fire Ins. Co. v. B&L Trucking and Const. Co.***, 134 Wn2d. 413, 951 P2d. 250 (1998) (in the absence of an allocation clause insurer is not to apportion damages arising from a single occurrence spanning a number of years). The court cannot add language to the insurance policy to either create or avoid liability. *See* ***Anderson v. Title Ins. Co.***, 103 Idaho 875, 878-79, 655 P2d. 82, 85-86 (1982);

Purvis v. Progressive Ins. Co., 142 Idaho 213, 216, 127 P3d. 116, 119 (2005). In the absence of policy language allowing Northland/Northfield the ability to apportion its reimbursement, it cannot, after the fact, question the reasonable defense costs ICRMP incurred.

In this case, the ICRMP and Northfield policies provide for the same coverages. Northfield, as a reinsurer, is obligated to honor the good faith settlements of its reinsured, ICRMP. For these reasons, Northfield is required to reimburse ICRMP for all defense costs incurred in the defense of the ICRMP insureds, as well as for the settlement paid to Donald Paradis. Accordingly, Northfield's motion should be denied.

V.

NORHTLAND, BY ITS DENIAL OF COVERAGE, HAS BREACHED ITS CONTRACT WITH ICRMP AND CANNOT CONTEST THE SETTLEMENT AGREEMENT ICRMP HAS NEGOTIATED

The undisputed facts in this litigation establish that when the ***Paradis*** lawsuit was first filed, Northland/Northfield was notified. *See* Affidavit of Richard B. Ferguson, ¶4; Complaint, Exhibit B. Northland/Northfield was provided copies of the Complaints and regular reports concerning the status of the litigation, as well as the costs that were being incurred. *See* Affidavit of Richard B. Ferguson, ¶4. Two years after the lawsuit was filed, Northland/Northfield sent ICRMP a letter stating its position that coverage did not exist and that it would refuse to indemnify ICRMP under the Northfield policy. *See*, Complaint, Exhibit C; *see also* Affidavit of

Richard B. Ferguson, ¶7. As outlined in the sections above, it is ICRMP's position that a potential for coverage existed which triggered ICRMP's duty to defend.

The impact of an insurer incorrectly refusing to provide coverage and thereby breaching the contract between itself and the insured was addressed by the Idaho Supreme Court in ***Exterovich v. Burress***, 139 Idaho 439, 80 P3d. 1040 (2003) with the court writing:

> A liability insurer such as ICRMP has two duties: the duty to defend and the duty to indemnify. The duty to defend arises upon the filing of a complaint containing allegations that, in whole or in part read broadly, reveal a potential for liability that would be covered by the insured's policy. ***Hoyle v. Utica Mut. Ins. Co.***, 137 Idaho 367, 48 P3d. 1256 (2002). If the insurer breaches its duty to defend and the insured settles a claim covered by the policy, the insurer has a duty to indemnify its insured for the amount of that settlement so long as a potential liability for the insured existed which resulted in a reasonable settlement in view of the size of possible recovery and the probability of the claimant's success against the insured. ***City of Idaho Falls v. Home Indemnity Co.***, 1206 Idaho 604, 888 P2d. 383 (1995). An insurer's duty to defend and indemnify are separate duties. *Id.*

See 139 Idaho at 441.

In ***Exterovich***, while the Supreme Court recognized that an insurer may, after previously denying coverage, assume its duty to defend. However, the insurer is bound by any admissions made by the insured which were part of a reasonable settlement. *Id.* at 442. This conclusion restated the court's prior ruling in ***City of Idaho Falls v. Home Indemnity Co.***, 126 Idaho 604, 888 P2d. 383 (1995) where the court held that an insurer was not entitled to relitigate an underlying action

following a settlement where the insurer had breached the contract between itself and its insured. *Id.* at 610.

In this case, Northland/Northfield cannot relitigate nor can it dispute the settlement reached between ICRMP and Mr. Paradis. Prior to the time the case was mediated, Northfield had already breached its contract with ICRMP by taking the position, two years after the litigation had been ongoing, that coverage did not exist and that it would not reimburse or indemnify ICRMP pursuant to the Northfield policy. *See* Complaint, Exhibit C. The February 13, 2006 letter denying coverage was a material breach of the Northfield policy which relieved ICRMP from any obligation that may have existed to obtain Northfield's consent to future settlements. Despite this, ICRMP afforded Northfield the opportunity to cure its breach by soliciting its involvement in strategy decisions surrounding possible mediation. *See* Complaint, Exhibit F; Affidavit of Richard B. Ferguson, ¶10. Northfield continued with its prior position refusing to attend mediation thereby ratifying its earlier breach of contract. *See* Complaint, Exhibit G; Affidavit of Richard B. Ferguson, ¶10.

As outlined above, the potential coverages afforded by the ICRMP and Northfield policies under the comprehensive general liability insuring agreements were identical. Additionally, as outlined above, the ***Paradis*** Complaints described potentially covered claims which triggered ICRMP's duty to defend and Northland/ Northfield's potential obligation to reimburse. It cannot be seriously questioned

that the decision to mediate the ***Paradis*** lawsuit was reasonable in light of the possibility for a multi-million dollar verdict against the ICRMP insureds. The amount of the ***Paradis*** settlement is also reasonable in light of the exposure and the fact, by virtue of the release agreement, ICRMP was able to shelter its insureds from the multi-million claim which was later made by the attorneys who had represented Mr. Paradis in the habeas corpus litigation. *See* Affidavit of Richard B. Ferguson, ¶12. The undisputed facts in this case establish that had the ***Paradis*** case gone to trial, there was a potential the ICRMP insureds would be held liable for a covered claim. Their potential exposure for covered and non-covered claims was catastrophic. The settlement was reasonable in light of the potential exposures ICRMP and its insureds faced. In fact, ICRMP was able to resolve the case for less than its anticipated cost to continue the defense through trial. *See* Affidavit of Richard Ferguson, ¶¶9, 11. Because Northland/Northfield breached its reinsurance contract with ICRMP, it cannot, at this stage, dispute the reasonableness of the settlement. Accordingly, Northland/Northfield's Motion for Summary Judgment seeking to absolve it from responsibility for the ***Paradis*** settlement should be denied.

DATED this 23rd day of April, 2007.

ANDERSON, JULIAN & HULL LLP

By _____
Phillip J. Collaer, Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of April, 2007, I served a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO NORTHLAND/NORTHFIELD INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Donald J. Farley
Bryan A. Nickels
Hall, Farley, Oberrecht & Blanton, PA
702 W. Idaho, Suite 700
PO Box 1271
Boise, Idaho 83701-1271

- ☒ U.S. Mail, postage prepaid
- ☐ Hand-Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Electronic Delivery

Phillip J. Collaer

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant Northland Insurance Companies,
Properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff, vs. NORTHLAND INSURANCE COMPANIES, Defendant.	Case No. CV OC 0617112 **REPLY IN SUPPORT OF DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT**

COMES NOW defendant, Northland Insurance Companies (whose proper name and identity herein is Northfield Insurance Company) (hereinafter "defendant Northfield"), by and through its undersigned counsel of record, pursuant to Idaho Rule of Civil Procedure 56, and hereby submits this reply in support of its motion for summary judgment, seeking this Court's order dismissing plaintiff Idaho Counties Risk Management Program Underwriters' ("ICRMP") Complaint and Demand for Jury Trial ("plaintiff's Complaint") with prejudice, on the grounds

that there are no genuine issues of material fact, and that defendant Northfield is entitled to summary judgment as a matter of law.

ARGUMENT

A. Plaintiff has identified no genuine issues of material fact.

In the summary judgment context, "[t]he burden of proving the absence of material facts is upon the moving party." Baxter v. Craney, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). However, "[t]he adverse party ... 'may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* "In other words, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Id.* "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Foster v. Traul, 141 Idaho 890, 893, 120 P.3d 278, 281 (2005).

In the present case, although outlining its own statement of facts, plaintiff does not assert that there is any genuine issue of material fact with respect to the facts identified by Northfield. Instead, plaintiff's facts are directed primarily to two areas: first, the actions taken by ICRMP in defending its own policy; and second, Northfield's actions prior to ICRMP's exhaustion of its self-insured retention ("SIR").

On the first subject, plaintiff identifies its own decisions regarding its own policy; for example:

- "ICRMP also review the allegations in the *Paradis* Complaint for potential coverage."
- "A decision was made that a duty to defend existed."
- "Kootenai County and the other defendants were advised of this decision and provided a reservation of rights letter."

- "Because of potential conflicts of interest, ICRMP, exercising its discretion over the management of the litigation, retained separate attorneys for Kootenai County, Mr. Haws, and Mr. Elliott."
- "It was ICRMP's position, at that time, that the existence of a continuing tort describing negligence, false arrest, false imprisonment, or violations of Mr. Paradis' constitutional rights described potentially covered claims which obligated ICRMP to provide a defense."
- "In light of the considerable exposure ICRMP faced for future defense costs, coupled with the possibility of an adverse judgment being entered against its insured, ICRMP made the decision that mediation."

Plaintiff's Response to Northland/Northfield Insurance Companies' Motion for Summary Judgment ("Plaintiff's Memo"), at 2-4. However, none of these questions are relevant to Northfield's motion now before the Court. ICRMP is an insurer, with its own policy, and its own duties ancillary to such policy. *See* Exterovich v. City of Kellogg, 139 Idaho 439, 441, 80 P.3d 1040, 1042 (2003)("A liability insurer such as ICRMP has two duties: the duty to defend, and the duty to indemnify."). No actions or decisions taken by ICRMP relevant to its own policy issued to Kootenai County have any bearing on questions of coverage under the Northfield policy. Accordingly, plaintiff's identified facts do not raise a genuine issue of material fact with respect to Northfield's policy.

Regarding the second category of facts identified by ICRMP, these apparently attempt to establish some variety of estoppel against Northfield; for example:

- Regarding the retention of multiple attorneys, "Northland/Northfield did not object to this approach."
- Regarding the use of multiple attorneys, "Again, throughout this time, Northland/Northfield never voiced any concerns or objections that multiple law firms were being used to defend the insureds or that a complete defense was being provided."
- "Northland/Northfield ratified its earlier breach of contract by restating its previous position that coverage did not exist and advising ICRMP it would not participate in mediation or settlement."
- "Throughout its longstanding relationship with Northland/Northfield, ICRMP has routinely provided a complete defense to its insured when they are sued for covered and non-covered claims."

- "Until the *Paradis* litigation, Northland/Northfield has never sought to allocate its reimbursement obligation by refusing to pay for attorneys' fees expended in cases involving covered and non-covered claims."
- "In all of these cases, once ICRMP's SIR is exhausted, a billing for reimbursement is presented to Northland/Northfield. That billing is paid without any request for allocation or apportionment."

Plaintiff's Memo at 2-5.

None of the above factual or conclusory assertions address whether or not a particular claim is covered under Northfield's policy, which is the subject matter of this litigation. Northfield's handling of prior other cases or claims involve fact-specific analysis of the particulars of such claims under the terms of the particular Northfield policy implicated by the claim, and is not, obviously, to be construed as *carte blanche* for any and all claims ICRMP may make against a Northfield policy. Moreover, until ICRMP advises Northfield that its SIR has been exhausted (which ICRMP did not do until June 27, 2006, after it had already exceeded its SIR layer by $273,305.33 (Complaint, Exh. F)), Northfield has no duty to reimburse, nor even any "duty to speak" with respect to its own policy, a principle recognized in the analogous excess insurer context. *See, e.g.,* All City Ins. Co. v. Sioukas, 378 N.Y.S.2d 711 (N.Y. A.D. 1976)("And since it did not have a policy affording coverage to the respondent until the primary coverage had been exhausted, it had no duty to serve a notice of disclaimer upon the respondent or upon his highly experienced attorneys."); St. Paul Fire Ins. Co. v. Children's Hosp. Nat'l Medical Center, 670 F. Supp. 393, 402 (D.D.C. 1987)("The issue here, however, is whether St. Paul had a duty to disclaim coverage or reserve rights under the excess policies at the time it assumed the defense of the Lee claims under the primary policy, or at some other time prior to judgment. We conclude that, prior to the time the verdict was rendered, St. Paul had no such duty to speak with respect to the excess policies."); Richmond, "Rights and Responsibilities of Excess Carriers," 78 Denver Univ. L.R. 29, 44-45 (2000) ("An excess carrier typically has no duty to

defend its insured until the limits of underlying coverage are exhausted . . . the majority position also makes sense because an insurer's duty to defend is expressly contractual, and if there is no policy language requiring an insurer to defend, there can be no duty to do so.").

As such, the facts identified by plaintiff are not "material", such as would raise a genuine issue of material fact sufficient to defeat Northfield's motion for summary judgment. Accordingly, there are no genuine issues of material fact, and, as discussed below and in Northfield's prior briefing, summary judgment should be granted.

B. The acts for which ICRMP seeks coverage predate Northland's coverage, and Northland has no contractual obligation to reimburse ICRMP.

The claims alleged by Mr. Paradis arise out of a single nucleus of allegations – the investigation, arrest, and conviction of Mr. Paradis in 1980 and 1981. The crux of Mr. Paradis' claims is the non-disclosure of exculpatory evidence by the *Paradis* defendants at the time of his conviction, and that the *Paradis* defendants continued to withhold such evidence. All of these allegations predate Northfield's 2000-2001 policy, and even predate Kootenai County's participation in ICRMP, which was not even created until 1985.

The guiding Idaho case in this matter is Kootenai County v. Western Cas. & Sur. Co., 113 Idaho 908, 750 P.2d 87 (1988). The holding of the Idaho Supreme Court is clear:

> An insurer is not liable "for claims arising out of an event or accident which occurred prior to the effective date of the insurance coverage, **even though damages and claims continued to accrue from this cause during the later period of coverage.**"

113 Idaho at 915 (quoting Appalachian Ins. Co. v. Liberty Mutual Ins. Corp., 507 F. Supp. 59, 62 (W.D. Pa. 1981), aff'd 676 F.2d 56 (3rd Cir. 1982))(emphasis added). In its brief, Plaintiff relies on cases that address accrual dates *for the purpose of determining statute of limitations application.* These cases have no bearing on the *triggering of insurance coverage*, a critical point that, for example, the Third Circuit has emphasized. City of Erie, Pennsylvania v.

Guaranty Nat. Ins. Co., 109 F.2d 156, 161-62 (3rd Cir. 1997) ("Reliance on the commencement of the statute of limitation is not dispositive in determining when a tort occurs for insurance purposes. Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns."); *accord,* Commercial Union Assurance Co. v. Zurich American Ins. Co., 471 F.Supp. 1011, 1015 (S.D.Ala.1979) ("cases dealing with the determination of the date or occurrence of a continuing injury or disease for the purpose of applying appropriate statute of limitations are not controlling for purposes of determining insurance coverage").

One of the primary reasons to distinguish between insurance and statute of limitations triggers is what is known as the "unwary insurer." As the Third Circuit explained:

> The other theme is that reliance on the "time of favorable termination" to trigger liability has unwise policy implications, for it allows tortfeasors with information about their own potential liability to shift the burden to unwary insurance companies. As the Court of Appeals for the Eighth Circuit noted, "... a contrary rule might well enable plaintiffs to lull an unwary insurer into extending coverage after they perceive an impending difficulty from a suit in which they are already engaged." *Royal Indemnity,* 979 F.2d at 1300. *See also Royal Indem. Co. v. Werner,* 784 F.Supp. 690, 692 (E.D.Mo.1992) ("Under this interpretation an individual who sees that his lawsuit may spawn a malicious prosecution claim cannot purchase insurance and shift his obligation to an unwary insurer."); *Harbor Insurance Co.,* 211 Cal.Rptr. at 910 (Under minority rule, "tortfeasor could purchase a policy such as this after committing the tort and thereby enjoy excess coverage for its yet-to-be unfolded consequences."); *Muller,* 232 A.2d at 175 ("To hold that coverage existed in such a case would mean that such a tortfeasor could purchase coverage a day before the injured person was acquitted in the criminal proceeding and thus shift the burden of damages to an unwary insurance company.").
>
> . . .
>
> The concerns about "the unwary insurer" are well-founded. Malicious prosecution is an intentional tort-the plaintiff must prove malice in order to prevail. As a theoretical matter, of course, a municipality that intends maliciously to bring criminal charges against a person may shift the burden of liability to an unwary insurance company even under the majority rule, by purchasing an occurrence policy the day before charges are filed. *See Roess,* 383 F.Supp. at 1235. Notwithstanding this observation, we believe it is more likely that an unscrupulous insured would purchase insurance after rather than before the

> initiation of a questionable prosecution. This counsels adoption of the majority rule.

Id. at 160-61. This is exactly what has happened here. What plaintiff proposes is a textbook example of the "unwary insurer": Northfield being subjected to a claim which occurred 20 years earlier. ICRMP does not assert that Kootenai County's insurer(s) prior to the formation of ICRMP - the insurers at the time of the alleged bad acts – are responsible for coverage. ICRMP does not assert that any other insurer after the formation of ICRMP – for any other policy year – is responsible for coverage while Mr. Paradis remained in prison, while the allegedly responsible individuals continued to withhold exculpatory evidence. Rather, ICRMP baldly asserts – contrary to Idaho law and the Idaho Supreme Court decision in Western Casualty – that the only insurer responsible for the $1.2+ million in damages and defense fees and costs is the insurer who had the misfortune to issue a policy for the time that Mr. Paradis happened to be released, more than 20 years after he was arrested.

The allegations in the *Paradis* Complaint and First Amended Complaint allege acts occurring in 1980 and 1981, acts that are intentional in nature[1], or acts committed by individuals *after* having left the employment of Kootenai County (such as defendant Haws, who left county

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1. Which, under the Northfield policy, are excluded:

> THIS SECTION DOES NOT APPLY – to any Claim for damages, whether direct or consequential, or for any cause of action which is covered under any other Section of this policy or
>
> A. to personal injury or property damage which the Assured intended or expected or reasonably could have expected but this exclusion shall not apply to personal injury resulting from the use of reasonable force to protect persons or property.

Affidavit of Brian Martens in Support of Motion for Summary Judgment ("Martens Aff."), Exh. A, at p. 16.

employment in 1983),[2] or were simply in furtherance of, or justification for, the original failure to disclose exculpatory evidence in 1980-81. None of the alleged acts fall within the coverage provided by the 2000-2001 Northfield policy, or any prior policy. Plaintiff points to language in the *Paradis* Amended Complaint which alleges violations of the duty to train and duty to disclose (per Brady) that were "continuing for years" after 1980 and 1981. Plaintiff's Memo at 18. This argument fails for two reasons: first, these allegations, at most, assert only "damages and claims" that continued to accrue after arising out of an event or accident which occurred prior to Northfield's policy coverage, for which coverage is precluded by virtue of Western Casualty; second, any ongoing "failure to disclose/failure to train" terminated with the discovery of the exculpatory evidence (the Haws notes) in January 1996 (Paradis v. Arave, 130 F.3d 385, 392 (9th Cir. 1997)) – again, years before the Northfield policy was issued.

ICRMP undertook a gratuitous defense of the Kootenai County defendants regarding the 1980 & 1981 occurrences, and is now attempting to make Northfield pay for ICRMP's own decision. Indeed – in a point not addressed by plaintiff – ICRMP itself initially denied the Paradis claim because the acts did not occur when it insured Kootenai county:

> The date of loss for this claim is June 24, 1980 (the date that Deputy Prosecutor Hawes learned of the exculpatory evidence and did not turn it over to Paradis's attorneys). This date could be stretched to the date of Paradis's conviction on the murder charge, which would have occurred in 1981, but that would still be well outside the retroactive date of the Policy.

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2. Plaintiff focuses on the later allegations against defendant Haws as justification for providing a defense, such as "continuing negligence on the part of Mr. Haws surrounding his alleged failure to disclose evidence which would have exonerated Paradis" and as "Haws continued to conceal evidence while he [Paradis] was in prison attempting to challenge his conviction through the appellate and habeas corpus litigation." Plaintiff's Response to Northland/Northfield Insurance Companies' Motion for Summary Judgment ("Plaintiff's Memo") at 19. However, it is undisputed that Mr. Haws left the employment of Kootenai County in 1983 (even prior to the formation of ICRMP), and acts alleged after that date could not have occurred while acting as an employee of the county, and thus, he would not be an insured under any ICRMP policy for acts undertaken by him after 1983. Affidavit of Counsel in Support of Motion for Summary Judgment ("Counsel Aff."), Exh. DD, at ll. 121:5-7; Counsel Aff., Exh. E, ¶113.

Affidavit of Donald J. Farley in Support of Defendant Northland Insurance Company's Motion for Summary Judgment ("Counsel Aff."), Exh. K (November 20, 2001 letter from Richard Ferguson, ICRMP, to Dennis Molenaar, Kootenai County). Plaintiff defends its defense in the *Paradis* litigation with an almost absolutist view: "Northfield makes the generalized statement that an insurer's duty to defend is not absolute. Other than restating the general rule that an insured must establish an affirmative link to coverages afforded by the policy, Northfield provides no other guidance for this proposition[.]" Plaintiff's Memo at 11. More correctly, this "generalized statement" is an express statement of law made by the Idaho Supreme Court: "However, the insurer's duty to defend is not absolute." Black v. Fireman's Fund American Ins. Co., 115 Idaho 449, 455, 767 P.2d 824, 830 (Ct. App. 1989). The Idaho Supreme Court later explained that the generally broad duty to defend, under Idaho law, "does not require an insurance company to file a declaratory judgment in every instance, even though it believes there is no potential for coverage, and then tender a defense until the lack of coverage is established." Hoyle v. Utica Mut. Ins. Co., 137 Idaho 367, 371, 48 P.3d 1256, 1260 (2002). An insurer is simply not bound to defend in every instance an insured is sued. The Idaho Supreme Court has ruled that, while a broad duty to defend exists, an insurer has the right to parse the allegations underlying a complaint to determine whether a duty to defend exists in a specific case:

> The FSI Complaint makes no express claim for negligence. Hoyle and HAII argue that a broad reading of the FSI complaint reveals a potential claim for negligence, evidenced by the use of the words "including but not limited to" and the allegations including breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, violations of statutory duties, implied contract, and conversion.
>
> These arguments are unpersuasive. Every claim in the FSI complaint alleges the acts in question were committed in a "fraudulent, improper and illegal" manner. Despite this, Hoyle and HAII go on to argue that the word "improper" includes negligence. This is also unpersuasive because in every instance it is used, it is paired with the term "fraudulent." Also, the term "improper" is in no way synonymous with the word "negligent." Hoyle and HAII argue Idaho law, namely

Kootenai County, requires the complaint to be read in whole *or in part,* and the district court failed to follow the latter part of this disjunctive rule. While *Kootenai County* does require the Complaint to be read in whole or in part, there are no parts of the complaint that reveal any potential claims for negligence. The use of the terms "improper", "illegal", "inconsistent with general industry standards", and "including but not limited to", read in part, are still insufficient to find a claim of negligence.

Hoyle and HAII also point to paragraph 71 of the FSI complaint, citing the language which alleges numerous "failures" to take certain actions. While this language sounds similar to that of a claim for negligence, this "failure" language clearly comes under a claim for breach of contract, in which Hoyle and HAII breached the contract by their failure to act.

Hoyle and HAII assert the claims for implied covenant of good faith and fair dealing and the breach of a fiduciary duty encompass negligence. An implied covenant of good faith and fair dealing claim sounds in contract. When an errors and omissions policy, such as the policy in the instant case, excludes intentional acts from coverage, an intentional breach of the covenant of good faith and fair dealing claim, as alleged by FSI, does not give rise to the duty to defend. *See Intermountain Gas Co. v. Industrial Indem. Co.,* 125 Idaho 182, 186, 868 P.2d 510, 514 (Ct.App.1994). Furthermore, although the breach of a fiduciary duty sounds in tort, and can be actionable for either intentional or negligent breaches of such duties, it is clear from the complaint that FSI is not alleging the breach of these duties were committed in a negligent manner. The complaint specifically alleges these duties were breached by "fraudulent, improper and illegal business activities and pursuits." Thus, FSI's claim for the intentional breach of the covenant of good faith and fair dealing and breach of fiduciary duty does not give rise to a duty to defend. *See Id.*

Hoyle and HAII assert the facts behind FSI's pleading reveal negligent acts. Even if the facts behind the FSI complaint might disclose negligent acts, it is irrelevant. This Court has previously rejected this argument in *Construction Management v. Assurance Company of America,* 135 Idaho 680, 23 P.3d 142 (2001). Pursuant to *Construction Management,* an insurer does not have to look beyond the words of the complaint to determine if a possibility of coverage exists. *Id.* at 684, 23 P.3d at 146.

Hoyle v. Utica Mut. Ins. Co., 137 Idaho at 372-73.

The broader, and indeed only, point with respect to defense in this case is whether defense costs are reimbursable as covered claims under *Northfield's* policy. Under the Northfield Policy, ICRMP was required to defend all claims that might involve the Northfield Policy:

> It is understood that all claims **under this policy** shall be serviced by I.C.R.M.P.'s Claims Department who shall perform the following duties:
> A. Investigate and settle or defend all claims or losses – it is understood that, when so requested, the I.C.R.M.P. Claims Department will afford Underwriters any opportunity to be associated with them in the defense or control of any claim, suit or proceeding.

Martens Aff., Exh. A, at p. 5 (emphasis added). Reference by plaintiff to the ICRMP policy in the duty to defend context – and the election to defend under that policy by ICRMP – is simply of no relevance to the present action. Further, plaintiff's suggestion that defendant acquiesced in ICRMP's defense (including costs and selection of attorneys) of ICRMP's own SIR, for purposes of application to the Northfield Policy (e.g., Ferguson Aff., ¶¶4-5), is incorrect; ICRMP elected to defend its own policy of its own accord, which decision is of no bearing on Northfield's obligation to reimburse for claims within the scope of Northfield's policy, and which was a defense ICRMP intended on defending, irrespective of the Northfield's position.[3]

The question is whether or not the claims are covered by the Northfield policy; as discussed above, they are not.[4] Accordingly, Northfield has no obligation to reimburse ICRMP for defense costs, let alone the cost of a settlement for an occurrence which is not covered under Northfield's policy. ICRMP's own analysis of its own policy or duties has no bearing on Northfield's coverage. Accordingly, Northfield should be granted summary judgment because

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3. Note, again, that Northfield was apparently not notified of the exhaustion of ICRMP's SIR until June 27, 2006, *after* ICRMP had expended $423,305.33 in defense costs, exceeding its SIR layer by $273,305.33. Complaint, Exh. F.

4. In the Affidavit of Richard B. Ferguson in Opposition to Defendant's Motion for Summary Judgment ("Ferguson Aff."), Mr. Ferguson suggests that Northfield acceded to the defense provided to the *Paradis* defendants. Ferguson Aff., ¶¶4-5. Of course, Northfield's obligation to reimburse, if any, would have only been triggered by the exhaustion of ICRMP's SIR of $150,000. However, Northfield was not notified of any such exhaustion until ICRMP had expended $423,305.33 in defense costs, exceeding its SIR layer by $273,305.33. Martens Aff., Exh. C. To the extent Northfield may have been denied an opportunity to manage defense costs upon the exhaustion of ICRMP's SIR by virtue of the delayed notice of the potentially reimbursable costs, Northfield should not be responsible for any such costs incurred prior to tender.

the events, happenings, and failure to disclose evidence by the Paradis defendants were not a covered occurrence under any *Northfield* policy.

C. The Northfield policy is not reinsurance

In a continuing effort to avoid the fatal effect of Kootenai County v. Western Casualty, ICRMP argues that the Northfield policy provides coverage as reinsurance.

In support of its claim, plaintiff identifies a single instance in the Northfield policy where the word "Reinsured" is used in an introductory passage. Plaintiff's Memo at 29. From this, plaintiff asserts that an ambiguity has arisen, requiring the entire insurance contract to be construed in ICRMP's favor, despite plaintiff's apparent concession that the Northfield policy has no follow-the-form provision, and no follow-the-fortunes provision. This is a nonsensical reading of the policy, and disregards Idaho law. *See, e.g.,* Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 141 Idaho 660, 663, 115 P.3d 751, 754 (2005) ("In construing an insurance policy, the Court must look to the plain meaning of the words to determine if there are any ambiguities. This determination is a question of law. In resolving this question of law, the Court must construe the policy "**as a whole, not by an isolated phrase.**") (emphasis added) (internal citations omitted). In the present case, the plaintiff has proposed an almost complete evisceration of the terms of the Northfield policy, not by focusing on a single isolated phrase, but on a single isolated word. Such a result is patently absurd, and this Court should reject plaintiff's argument.

1. *There is no follow-the-forms provision.*

Plaintiff concedes that there is no follow-form language in the Northfield policy. Plaintiff's Memo at 32 ("The fact a follow the form clause does not exist in the Northfield policy...."). Instead, plaintiff argues that the language is "very similar," implicitly asserting that

the net result is a rewriting of the Northfield policy, in its entirety, into a policy governed by the language of the ICRMP policy and ICRMP's own interpretation thereof.

This disregards the language of Northfield's policy, which does not even reference the ICRMP policy, as a traditional reinsurance (or excess) policy would do. Martens Aff., Exh. A. Moreover, a comparison of the language of the two policies demonstrates that the coverages are, in fact, different in key areas. For example, with respect to the definition of "occurrence" under Section II coverage, the ICRMP policy provides, in relevant part, that:

> All personal injuries to one or more persons and/or property damage arising out of **an accident or a continuous or repeated exposure to conditions** shall be deemed one occurrence.

Counsel Aff., Exh. I, at p. 14 (emphasis added). The Northfield "single occurrence" provision, however, incorporates *more* than just "accidents" and "continuous or repeated exposure to conditions":

> All personal injuries to one or more persons and/or property damage arising out of an accident **or a happening or event** or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

Martens Aff., Exh. A, at p. 6 (emphasis added). Thus, the breadth of the Northfield "single occurrence" provision dictates that a wider swath of claims arising from a common nucleus of facts is deemed to be a single occurrence.

Similarly, Northfield's intentional act exclusion, which is also at issue in this litigation, is broader than that provided by ICRMP. ICRMP's policy provides, under the Section II exclusions:

> Liability Coverage under the Comprehensive General Liability Insuring Agreements does not apply:
>
> . . .
>
> 2. To personal injury or property damage resulting from an act or omission **intended or expected from the standpoint of any insured** to cause personal injury or property damage. This exclusion applies even if the personal injury or property damage is of a different kind or degree, or is sustained by a different

person or property, than that intended or expected. This exclusion shall not apply to personal injury resulting from the use of reasonable force to protect persons or property, or in the performance of a duty of the insured.

Counsel Aff., Exh. I, at p. 16 (emphasis added). Again, the parallel Northfield policy exclusion is broader in what is excluded:

> THIS SECTION DOES NOT APPLY – to any Claim for damages, whether direct or consequential, or for any cause of action which is covered under any other Section of this policy or
>
> A. to personal injury or property damage which the Assured intended or expected **or reasonably could have expected** but this exclusion shall not apply to personal injury resulting from the use of reasonable force to protect persons or property.

Martens Aff., Exh. A, at p. 16 (emphasis added).

The policies may be parallel in structure and some language, but the Northfield policy is not a duplicate of the ICRMP policy. The Northfield policy simply cannot be construed to be a subservient echo of the ICRMP policy, especially in the absence of any follow-the-form provision or any mention of the ICRMP policy, within the terms of the Northfield policy.[5]

Accordingly, plaintiff's argument on this point fails.

2. *There is no follow-the-fortunes provision, nor does the follow-the-forms doctrine apply.*

Plaintiff does not dispute that no follow-the-fortunes provision appears in the Northfield policy. Rather, plaintiff asserts that it should be imputed. The Michigan Court of Appeals addressed a similar argument and rejected it:

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5. Although not expressly stated, the tenor of portions of the briefing and Ferguson Aff. suggests a "reasonable expectation" argument – that is, that ICRMP thought it was purchasing reinsurance, and that Northfield is foreclosed from disputing coverage based upon that expectation. However, Idaho does not recognize the "reasonable expectations" doctrine. *See* Ryals v. State Farm Mut. Auto. Ins. Co., 134 Idaho 302, 304, 1 P.3d 803, 805 (2000) ("The traditional rules of contract construction avoid the danger of a court creating a new contract between the parties by relying on the notion of reasonable expectations."); *accord* Walls v. U.S. Life Ins. Co., 119 Idaho 160, 804 P.2d 333 (Ct. App. 1991). Additionally, such an argument rings hollow, given that the plaintiff itself is an insurer, and not an unsophisticated layman – if plaintiff had wanted a standard follow-the-form, follow-the-fortunes reinsurance policy, it certainly could have purchased such a policy.

Although the "follow the fortunes" doctrine is applicable in those instances where such a clause is part of the agreement, we are confronted in this appeal with the broad contention that such a provision is to be read into every reinsurance contract. In advancing this proposition, the court below relied heavily on *Int'l Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates at Lloyd's of London,* 868 F.Supp. 917 (S.D.Ohio, 1994), wherein a federal district court in Ohio ruled that even in the absence of express contract language, "the 'Follow the Fortunes' doctrine applied to all reinsurance contracts." *Id.* at 920. As authority to support its ruling, the federal district court cited three cases. However, we note that in each of those cases, the reinsurance contract at issue contained specific language indicating incorporation of the "follow the fortunes" doctrine. See *Mentor Ins. Co. (UK) Ltd. v. Brannkasse,* 996 F.2d 506, 516 (C.A.2, 1993) ("The parties agree that the contract contains a 'follow the fortunes' clause."), *Unigard Security Ins. Co., Inc. v. North River Ins. Co.,* 762 F.Supp. 566, 586 (S.D.N.Y., 1991) ("The Certificate binds Unigard to 'follow the fortunes' of North River on the Owens-Corning risk by providing that '[a]ll claims covered by this reinsurance when settled by [North River] shall be binding on the Reinsurers, who shall be bound to pay their proportion of such settlements.' "), and *Christiania General Ins Corp of New York, supra* at 280 ("The parties' contract states that '[t]he reinsurance provided under this certificate shall follow coverage of [Great American's] policy."). [FN1]

FN1. Under California law, the doctrine may be implied in a contract of reinsurance by evidence that a custom or usage exists to "follow the settlements" of the reinsured. *Nat'l American Ins. Co. of California v. Certain Underwriters at Lloyd's London,* 93 F.3d 529, 537 (C.A.9, 1996).

In this appeal, MTPP concedes that the reinsurance contract at issue "does not contain a specific 'follow the fortunes' clause." Moreover, MTPP is unable to point to any Michigan authority for support of its position that such a provision should be read into the policy. Indeed, we find that Michigan guidance points in the opposite direction. In *Michigan Millers, supra,* this Court addressed a dispute between two insurance companies under a contract of reinsurance. The reasoning and explanation of reinsurance law provided by the *Michigan Millers* Court is particularly instructive in this setting. There, our Court pointed to 19 Couch, Insurance, 2d, § 80.66, pp. 673-674, to emphasize that "[t]he extent of the liability of the reinsurer is determined by the language of the reinsurance contract, and the reinsurer cannot be held liable beyond the terms of its contract merely because the original insurer has sustained a loss." *Id.* at 414, 452 N.W.2d 841. At another point in *Michigan Millers,* this Court stated:

> Although it is true that parties may agree to such terms in reinsurance as will bind the reinsurer to the settlement or adjustment of loss made between the parties to the original insurance, 19 Couch on Insurance 2d, § 80.13, p. 631, we will not impose liability on the reinsurer for a settlement contribution absent such an agreement. [*Id.* at 417-418, 452 N.W.2d 841.]

> Such statements respecting reinsurance are completely consistent with a plethora of Michigan cases in the field of insurance law. For example, in *Lehr v. Professional Underwriters,* 296 Mich. 693, 697, 296 N.W. 843 (1941), our Supreme Court stated: "The liability was limited in the policy. To hold otherwise would be to write a new contract for the parties. This we have no right to do." See also *Auto-Owners Ins. Co. v. Churchman,* 440 Mich. 560, 566-567, 489 N.W.2d 431 (1992); *Upjohn Co. v. New Hampshire Ins. Co.,* 438 Mich. 197, 207, 476 N.W.2d 392 (1991); *Fragner v. American Community Mut. Ins. Co.,* 199 Mich.App. 537, 542-543, 502 N.W.2d 350 (1993); *North River Ins. Co. v. Endicott,* 151 Mich.App. 707, 712, 391 N.W.2d 454 (1986).
>
> After careful consideration, we conclude and hold that the learned trial court erred in reading into the reinsurance contract at issue in this case a "follow the fortunes" clause that was not agreed to by the parties.

Michigan Tp. Participating Plan v. Federal Ins. Co., 592 N.W.2d 760, 764-65 (Mich. App. 1999). The Michigan court's refusal to rewrite an insurance agreement to disregard agreed-to contractual terms echoes Idaho law: "Where policy language is found to be unambiguous, the Court is to construe the policy as written, 'and the Court by construction cannot create a liability not assumed by the insurer nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability." Purvis v. Progressive Cas. Ins. Co., 142 Idaho 213, 216, 127 P.3d 116, 119 (2005).

This is especially true where the policies lack concurrency of coverage. For example, in applying the follow-the-fortunes doctrine, the U.S. District Court for the Southern District of New York stressed: "Thus, **assuming concurrency of coverage**, when a ceding company enters into a settlement that is grounded on a reasonable interpretation of its own policy, the reinsurer may not avoid liability by raising policy defenses and objections that were available to the cedent," having earlier remarked that "concurrency between the insurance and reinsurance policies is a what makes reinsurance work[.] Aetna Cas. and Sur. Co. v. Home Ins. Co., 882 F. Supp. 1328, 1337 & 1347 (S.D.N.Y. 1995) (also discussing the necessity of a "mirror image

change in the policy of reinsurance" if the underlying policy is changed; otherwise, the "operation of concurrency breaks down.").

In the present case, there is no follow-the-fortunes provision, so Idaho law does not permit one to be grafted in; further, the follow-the-fortunes doctrine would be otherwise inapplicable as there is not a concurrency in coverage between the ICRMP and the Northfield policies. Accordingly, plaintiff's argument on this point fails, and defendant should be granted summary judgment.[6]

D. Plaintiff's continuing tort analysis is inapplicable to the action at bar.

As previously explained by defendant, reliance upon continuing tort analysis *in the statute of limitations context* is of no aid in an insurance coverage-trigger context. *Compare* Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982) (cited by plaintiff, but noting that "the relevant strain of continuing violation doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period.")(emphasis added) *with* City of Erie, Pennsylvania v. Guaranty Nat. Ins. Co., 109 F.2d at 161-62 ("Reliance on the commencement of the statute of limitation is not dispositive in determining when a tort occurs for insurance purposes. Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns.").

Plaintiff maintains its argument that a continuing tort theory applies to the allegations made in this action via reliance, in large part, upon cases premised on long-latency injuries, such

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6. Plaintiff also disputes Northfield's right to reimburse for covered claims, but not for uncovered claims. Again, the Northfield policy provides for reimbursement of expended defense costs for "claims under this policy." Martens Aff., Exh. A, p. 5. Although apparently an open question in Idaho, other jurisdictions allow for limiting reimbursement to only covered claims. *See, e.g.,* Commercial Capital Bankcorp. Inc. v. St. Paul Mercury Ins. Co., 419 F. Supp.2d 1173 (C.D. Cal. 2006); Lockwood Intern., B.V. v. Volm Bag Co., Inc., 273 F.3d 741 (7th Cir. 2001). However, at this stage in the litigation, this question is likely premature, as it is largely a question limited solely to an evaluation of any damages.

as toxic torts. At least one court has explained why a claim such as malicious prosecution is not analogous to asbestos/toxic tort-type claims:

> Our Supreme Court has thus far adopted the "multiple trigger" theory to determine the occurrence of injury for insurance coverage purposes only in cases involving toxic torts. *See J.H. France Refractories v. Allstate Insurance Co.*, 534 Pa. 29, 626 A.2d 502 (1993). The "multiple trigger" theory is applied in latent disease cases, like asbestosis or mesothelioma, because such injuries may not manifest themselves until a considerable time after the initial exposure causing injury occurs. The overriding concern in latent disease cases is that application of the *D'Auria* "first manifestation" rule would allow insurance companies to terminate coverage during the long latency period (of asbestosis); effectively shifting the burden of future claims away from the insurer to the insured (manufacturers of asbestos), even though the exposure causing injury occurred during periods of insurance coverage. *See Keene Corp. v. Insurance Co. of North America,* 667 F.2d 1034 (D.C.Cir.1981).
>
> Here, we are not faced with a situation where the injuries, occasioned by the tort, lay dormant for extended periods. When the allegedly wrongful suit is filed, the injuries caused by the tort-humiliation, damage to reputation, suspense, physical hardship and legal expenses-manifest themselves and become evident to a reasonable defendant and, by implication, to the initiator of the wrongful proceedings. Moreover, there is no intervening time period between the filing of the allegedly wrongful suit and the manifestation of the injury that would allow a risk aversive insurance company to terminate coverage.[FN7]
>
> FN7. Our research has not uncovered a single jurisdiction that has adopted the "multiple trigger" approach in a case involving malicious prosecution.
>
> We conclude that the "first manifestation" rule applies and now hold that the tort of Wrongful Use of Civil Proceedings occurs for the purpose of determining insurance coverage when the allegedly wrongful suit is filed. Because neither the INA nor Selective policies were in effect at the time the allegedly wrongful suit was filed, neither is required to defend and indemnify appellants in the underlying suit for Wrongful Use of Civil Proceedings.
>
> We additionally note that strong policy considerations underpin our decision to apply the "first manifestation" rule to cases involving Wrongful Use of Civil Proceedings. The adoption of a "multiple trigger" approach or one which triggers insurance coverage at the "time of favorable termination" would allow a tortfeasor with knowledge of his own potential liability to shift this burden to an unwary insurance company. Such an outcome would contravene the well-established rule that a person may not insure against an injury that has already occurred. *See Appalachian Insurance Co. v. Liberty Mutual Insurance Co.*, 676 F.2d 56 (3rd Cir.1982).

Consulting Engineers, Inc. v. Insurance Co. of North America, 710 A.2d 82, 87-88 (Pa. Super. 1998).

Plaintiff first relies on the Wisconsin Court of Appeals decision in Wisconsin Electric Power Co. v. California Union Ins. Co., 142 Wisc. 2d 673, 419 N.W.2d 255 (1987). The facts outlined in that matter demonstrate that it is a long-latency trespass/nuisance variety of action:

> Although the facts of this case are complicated, they are not in dispute. In 1970, WEPCo installed a three-phase power supply to the dairy farm of Wallace and Joan Daggett (the Daggetts). Shortly after this new electrical source was installed, the Daggetts began noticing unusual behavior on the part of their cows including nervousness, a decline in milk production, failure to breed, ill health and sometimes death. **In 1981, the cause of these problems was determined to be stray voltage from the new three-phase power supply**. In 1982, WEPCo altered the power system and the problems with the dairy cows ended.

419 N.W.2d at 675-76 (emphasis added). In fact, the court noted the difficulty in identifying the precise date of injury:

> The term "occurrence" as applied to the present case is ambiguous. In the usual case, there is little dispute as to when an injury occurs when dealing with a common injury or accident. **However, with this type of injury, there is considerable dispute as to when the injury is deemed to occur.** It is therefore our duty to determine what a reasonable person in the position of the insured would have understood the words to mean.

Id. at 680 (emphasis added).

Such an analysis is equally true of Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), an asbestos case relied upon by plaintiff and by the Wisconsin Electric court. In that case, the court discussed the difficulty in identifying a trigger date in analyzing insurance coverage:

> The language of each policy at issue in this case clearly provides that an "injury," and not the "occurrence" that causes the injury, must fall within a policy period for it to be covered by the policy. Most suits brought under this type of policy involve an injury and an occurrence that transpired simultaneously, or, at least, in close temporal proximity to one another. In cases involving asbestos-related disease, **however, inhalation-the "occurrence" that causes the injury-takes place substantially before the manifestation of the ultimate injury-asbestosis, mesothelioma, or lung cancer.** Furthermore, although it is not known how little

> exposure is required to cause disease, inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period. For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. Asbestos-related diseases, which are certainly covered by the policies, therefore differ from most injuries and hence present a difficult problem of contractual interpretation.

667 F.2d at 1040 (emphasis added).

Nor do extrapolations of Idaho decisions assist plaintiff in this matter. Plaintiff relies, in part, on Unigard Ins. Co. v. USF&G, 111 Idaho 891, 728 P.2d 780 (Ct. App. 1986), where the court examined whether the damaging of 98 doors in a four hour period would constitute a single occurrence or multiple occurrences for the purposes of determining the number of deductibles that might be applicable (whether one per door, or one for the entire incident). The court explained:

> The most recent formulation, and the approach that we find most useful for cases of the present type, has been termed the "functional event" or "continuous process" test. It focuses not upon the individual events of damage but upon the underlying cause. The critical inquiry is whether or not the damage-causing process was continuous and repetitive.

111 Idaho at 893. In fact, the court's application of the continuing process test supports defendants' position in this matter. The crux of this action is the alleged bad acts by the defendants in the *Paradis* litigation in withholding exculpatory evidence from Mr. Paradis beginning before the trial, which resulted in Mr. Paradis being wrongfully imprisoned for approximately 20 years. The "underlying cause," the focus of any such continuous process test, is the allegedly wrongful actions taken over 25 years ago, long before the inception of ICRMP, and before the issuance of any Northfield policy. Moreover, the court cautioned:

> We recognize, of course, that neither the continuous process approach nor any other approach derived from case law should be applied if the insurance policy

> itself contains a dispositive definition of "occurrence" or "accident." As mentioned earlier, the policy in this case does not contain such a definition.

111 Idaho at 894. In the present case, "occurrence" is defined in the Northfield Policy. Martens Aff., Exh. A, at p.6. Specifically, the policy provides:

> For Section II, "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which result in personal injury or damage to property during the policy period. All personal injuries to one or more persons and/or property damage arising out of an accident or a happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

Id. (emphasis added). Thus, Unigard also supports Northfield's position, not plaintiff's.

Plaintiff also cryptically cites two opinions that are cross-ways with its position that the 2000-2001 Northfield policy is the policy which must cover all of the claimed damages, despite Mr. Paradis' assertion that the wrongful acts commenced with his arrest in June 1980. In Dioceses of Winona v. Interstate Fire & Casualty Co., 89 F.3d 1386 (8th Cir. 1996), the court applied Minnesota law to find that the repeated sexual abuse of a child constituted "one continuing occurrence." *Id.* at 1391. In doing so, the court held that *multiple* insurers could be held responsible for policies covering certain portions of time during the 1979-1987 span of the abuse. *Id.* at 1395-96. In doing so, the court went on to note:

> The parties agree that Mrozka's abuse began in October 1979 and continued until February 1987. Thus, it is undisputed that Mrozka suffered "actual injury" in all policy periods, triggering the coverage of all such policy periods. *See NSP,* 523 N.W.2d at 663.[FN11] We have determined, however, that there was no covered "occurrence" for purposes of insurance coverage for the Archdiocese after December 1980, thus, the only insurance coverage triggered are those in effect from October 1979 through December 1980: Aetna's through August 30, 1980, and Lloyd's and Interstate's commencing September 1, 1980.
>
> FN11. Furthermore, as we discussed in footnote 5, *supra,* the court in *NSP* also held that **in situations in which multiple policies involved where there was one continuous occurrence, the courts should apply one full SIR or limit to each separate policy period.** 523 N.W.2d at 664. Thus, under the rationale set forth in *NSP,* the Archdiocese must assume the retained limit with respect to each of the triggered policies.

> Under *NSP,* where insurers are held consecutively liable, and there is no evidence allocating the timing of actual damages, the proper method is to allocate damages pro rata by each insurer's "time on the risk." 523 N.W.2d at 662 (citing *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.,* 633 F.2d 1212 (6th Cir.1980), *amended,* 657 F.2d 814 (6th Cir.1981), *cert. denied,* 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981)). Each triggered policy, therefore, bears a share of the total damages proportionate to the time period it was on the risk relative to the time period coverage was triggered. *Forty-Eight Insulations,* 633 F.2d at 1224. The Archdiocese must bear its share of the liability risk for the period in which it had no insurance coverage-that is, after December 1980. *Id.*
>
> Adamson's abuse of Mrozka lasted 89 months, from October 1979 through February 1987. Aetna insured the Archdiocese from September 1979, through August 1980; thus, it is "on the risk" for eleven of 89 months. Lloyd's and Interstate insured the Archdiocese from September 1980 through December 1980, which is the time when Adamson's abuse of Mrozka was no longer an occurrence for the purposes of coverage. Thus, Lloyd's and Interstate are "on the risk" for four of 89 months.
>
> A judgment was rendered against Aetna for $41,422. This is not contested on appeal. The math used to reach the verdict was based on the Archdiocese being responsible for 45 percent of the state court verdict of $924,570 [FN12] resulting in the sum of $416,056.50. When this sum is proportioned over 89 months, the allocation per month is $4,674. When multiplied by the eleven months Aetna was on the risk the overall liability is $51,422. Subtracting the Archdiocese's $10,000 SIR, the amount owed by Aetna is $41,422.

Id. at 1396. Thus, Dioceses actually contemplates a scenario where, if applied here, would implicate all policies – including Kootenai County's pre-ICRMP coverage – commencing with Mr. Paradis' damages, rather than the single policy damage assignment forwarded by plaintiff in this action. Even assuming the application of the Minnesota "continuing occurrence theory" in the present case, Mr. Paradis claimed damages from June 1980 (the date of his arrest) until April 2001 (the date of his release), a period of 20 years & 10 months (250 months total). The amounts expended in defense and settlement here total approximately $1,223,305.33. (Complaint, ¶XXI & Exh. F.) The amount allocated per month would be $4,893.22; the Northfield policy at issue would put Northfield "on risk" for 12 of the 250 months, for a total on-

risk allocation of $58,718.64. As ICRMP's SIR ($150,000) would be triggered for that policy period, Northfield would owe no reimbursement amounts.[7]

Despite the logic of the risk allocation found in the Dioceses case, there is nothing under Idaho law that would suggest its rationale would or should be adopted here. Instead, in this case, the entire controversy and the *Paradis* complaints go back to the failure to disclose and his consequent conviction. He was ultimately released and exonerated of murder because of the initial failure to disclose potentially exculpatory evidence.

Finally, the Curtis v. Firth decision is not as broad as plaintiff suggests, as demonstrated by the recent McCabe v. Craven decision by the Idaho Court of Appeals. ____ P.3d ____, 2007 WL 1229095 (Ct. App., April 19, 2007). In McCabe, an inmate was held for 228 days beyond the expiration of his sentence; he filed suit alleging a variety of claims, including cruel and unusual punishment, and due process and equal protection, based upon his claims that he had been wrongfully imprisoned. *Id.* at *1. Complicating the inmate-plaintiff's claims was the fact that he filed two years from the last date of his incarceration; the district court held that his claims had been barred by the statute of limitations, based upon an earlier claimed discovery date. *Id.* at *2. The Court of Appeals clarified the breadth of its application of continuing tort concepts:

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7. County of Suffolk v. Travelers Ins. Co., 267 F. Supp. 2d 288 (E.D.N.Y. 2003) appears to support a similar result. In that matter, suit was filed regarding alleged property damage as the result of a sea wall allegedly poorly constructed some 35 years earlier. *Id.* at 290-91. The court ultimately found an issue of material fact with respect to several policy years from two separate insurers, rather than a single policy to which the damage could be attributable. Additionally, note that the policies at issue in County of Suffolk appear to lack the "occurrence" definition proviso that "All personal injuries to one or more persons and/or property damage arising out of an accident or a happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence" as is present in the Northfield policy. Note that this was a special caveat raised by the National Casualty Ins. Co. v. City of Mt. Vernon, 128 A.D.2d 332, 515 N.Y.S.2d 267 (1987) decision, wherein the court carefully noted that ""there is nothing in the policy which requires, as a prerequisite to ascertaining whether there is coverage, that the injury resulting from a causative event be reduced to a single or fixed occurrence in time." 515 N.Y.S.2d at 270. The other deficiencies regarding Mount Vernon have previously been addressed by defendant. *See* Defendant's Response to Plaintiff's Motion for Partial Summary Judgment, filed December 12, 2006, at 22-24.

As we explain, McCabe's allegedly wrongful incarceration presents tortious conduct that is serial in nature, although a recurring wrong does not in itself justify characterization as a continuing tort.[FN5] *See Curtis v. Firth,* 123 Idaho 598, 603-04, 850 P.2d 749, 754-55 (1993). In continuing tort or continuing wrong cases, it is the cumulative effect of a continuous chain of tortious activity that causes injury, *id.,* and the wrongful acts must be so numerous and continuous that it is impractical to allocate damages across them. *Heard,* 253 F.3d at 318-19. "Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable." *Curtis,* 123 Idaho at 603, 850 P.2d at 754 (quoting *Page,* 729 F.2d 818, 821-22 (D.C.Cir.1984)).

> FN5. The Idaho Supreme Court has characterized the doctrine of continuing violation as a doctrine of accrual and has cited with approval to its description by one federal court. *See Curtis v. Firth,* 123 Idaho 598, 603, 850 P.2d 749, 754 (1993) (quoting *Page v. United States,* 729 F.2d 818, 821-22 (D.C.Cir.1984)). Our point of accrual analysis being the same under section 1983 and the ITCA, we therefore uniformly apply the common law doctrine of continuing violation to McCabe's federal and state claims.

The wrongful incarceration alleged here is not the type of continuing conduct irreducible to particular wrongful acts. McCabe reasonably could have commenced his action on the first day of wrongful imprisonment (or when he reasonably should have discovered the injury), rather than waiting until after his last day of imprisonment. Unlawful imprisonment is unlike the uncompleted construction project or the intentional infliction of emotional distress justifying application of the continuing tort doctrine in *Farber v. State,* 102 Idaho 398, 630 P.2d 685 (1981) and *Curtis.* Thus, McCabe cannot bring suit for damages from any wrongful acts occurring outside the statute of limitations period.

Our holding is in line with *Cobbley v. City of Challis,* 138 Idaho 154, 59 P.3d 959 (2002), which involved a series of ongoing, discrete nuisances caused by dust from speeding cars. While the *Cobbley* Court recognized that a continuing nuisance is in some ways analogous to a continuing tort, the *Cobbley* Court implicitly recognized an important difference. In true continuing tort cases such as *Farber* and *Curtis,* where the wrongful acts are not reasonably reducible to individual causes of actions, the plaintiff can capture acts outside the filing period so long as any portion of the cumulative conduct occurs within the statutory limitations period. This "reach back" effect was not applied, however, to the continuing nuisance in *Cobbley* and should not apply to other serial violations consisting of fairly identifiable and actionable wrongs, each of which cause discrete injury. *Cobbley,* 138 Idaho at 158-59, 59 P.3d at 963-64.

In *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 110-121 (2002), the United States Supreme Court similarly distinguished a series of discrete acts, such as weekly discriminatory paychecks, from a hostile working environment in

which the injurious employment practice cannot be said to occur on any particular day. Under this dichotomy, the Court held that "discrete discriminatory acts are not actionable if time barred,[FN6] even when they are related to acts alleged in timely filed charges." *Id.* at 113.

> FN6. As the Court reminded, "this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel." *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002)

For purposes of accrual, we conclude that each day of allegedly wrongful imprisonment in the instant case was analogous to receiving a discriminatory paycheck or enduring another day of a continuing nuisance. **Each new day that McCabe was wrongfully imprisoned represents another day on which the statute of limitations begins to run.[FN7] Having waited until two years after the last day of his imprisonment to file his complaint, McCabe's action may proceed on his claim for damages but only for one day of wrongful imprisonment-March 7, 2003.**

> FN7. This is not to suggest that the wrongfully imprisoned are permitted to sleep on their rights while accruing damages. Because the writ of *habeas corpus* for sentence miscalculation, I.C. § 19-4203(2), provides a means for relief from wrongful imprisonment, the affirmative defense of laches may be asserted when necessary to prevent abuse of our holding here.

Id. at *3-4 (emphasis added). Thus, McCabe demonstrates that Idaho views the continuing tort concept – in the statute of limitations context – more narrowly than proposed by plaintiff. However, discussion of Curtis and McCabe is an academic point, as neither Curtis nor McCabe has any application in an insurance-trigger context, unlike the more specific (and controlling) Western Casualty decision. Kootenai County v. Western Cas. & Sur. Co., 113 Idaho at 113 ("An insurer is not liable 'for claims arising out of an event or accident which occurred prior to the effective date of the insurance coverage, even though **damages and claims** continued to accrue from this cause during the later period of coverage.')(emphasis added).

Accordingly, this Court should reject plaintiff's argument on this point.

E. Northfield has not waived any right to dispute the settlement amount, but more importantly, that claim or issue raised by ICRMP is not material to whether there is coverage under the Northfield policy.

Lastly, plaintiff asserts that because Northfield has contested any obligation to reimburse ICRMP for the *Paradis* matter, it has waived any right to contest the reasonableness of the *Paradis* settlement.[8] ICRMP's argument on this point is nothing more than a "red herring," attempting to divert attention from the issue of whether there is coverage under Northfield's policy. If there is no coverage or obligation to reimburse ICRMP for any amount expended, an argument that because Northfield denied coverage prohibits it from contesting the amount of settlement is quite irrelevant.

In any event, in making such argument, plaintiff relies upon Exterovich, 139 Idaho 439 (2003), which addressed the consequences of an insurer's refusal to defend in light of an insured's admission of liability. The applicability of the Exterovich holdings in the present action is somewhat dubious, given that: a) Exterovich addressed only the consequence of a *failure* to defend – here, Northfield has no *duty* to defend; b) Exterovich only addresses an admission of liability, and not the actual money amounts expended in settlement – here, plaintiff seeks to expand Exterovich to foreclose discussion of the settlement amounts; and c) Exterovich still requires that a settlement be "reasonable": "The breach of the duty to defend does not prevent the insurer from later providing a defense, although in this case ICRMP would be bound by the City's admission of liability **as long as it was potentially liable and such admission was a reasonable settlement**." *Id.* at 442. The right of an insurer to dispute the reasonableness of a settlement is simply not foreclosed following a denial of coverage. *See, e.g.,* Noya v. A.W. Coulter Trucking, 49 Cal. Rptr. 3d 584, 589-90 (Cal. App. 2006) ("We note that Zurich will not be deprived of an opportunity to contest the amount of the settlement in a subsequent action for bad faith. When an insurance carrier has denied coverage and a defense, 'a reasonable settlement

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8. Plaintiff does not, apparently, dispute Northfield's right, if found to have breached its reimbursement duty, to challenge the reasonableness of the defense fees and costs incurred in the defense of the *Paradis* action.

made by the insured to terminate the underlying claim against him may be used as presumptive evidence of the insured's liability on the underlying claim, and the amount of such liability.'"); Connecticut Indemn. Co. v. Perrotti, 390 F. Supp. 2d 158, 170 (D. Conn. 2005)("'It is well settled that when an insurer improperly fails to defend an insured who subsequently settles the case with the injured party, the insurer is estopped from raising the issue of the insured's liability as a defense to the action arising from an insurer's failure to defend. ... Nevertheless, the [insured] is required to prove that the settlement – whether it be by stipulated judgment or otherwise – was reasonable.'"); Detroit Edison Co. v. Michigan Mut. Ins. Co., 301 N.W.2d 832, 836 (Mich. App. 1980) (" Because Edison did not enter into the settlement with Tocco until after the declaratory judgment action had been decided in circuit court, Mutual has not had an opportunity to present evidence to show that the settlement was unreasonable or made in bad faith or that there was no liability. Before a judgment for the amount of the settlement is entered against Mutual, Mutual should be allowed to attempt to make such a showing. ... In view of the ambiguity in the complaint against Edison as to whether supervisory or non-supervisory negligence was being alleged, Mutual should also be permitted to attempt to show that, even though Edison was liable to Tocco, Edison's liability was not covered by the policy issued by Mutual."). As further explained by the Third Circuit, in the reinsurance context:

> But while a 'follow the fortunes' clause limits a reinsurer's defenses, it does not make a reinsurer liable for risks beyond what was agreed upon in the reinsurance certificate. In that regard, the reinsurer retains the right to question whether the reinsured's liability stems from an unreinsured loss. A loss would be unreinsured if it was not contemplated by the original insurance policy or if it was expressly excluded by terms of the certificate of reinsurance.

North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1199-1200 (3rd Cir. 1995).

For an analogous Idaho example, although this action does not involve any breach of the duty to defend by Northfield, Idaho has been loath to impose estoppel as a punitive measure to grant fees and costs where an insurer has refused to defend:

> The Hirsts urge that we should adopt an alternative to the *Afcan* approach. They cite what might be characterized as the "Illinois rule." That rule holds that where the insurer violates its duty to defend, the insurer is estopped to deny coverage-thereby invoking the following broad measure of damages to the insured: (1) the costs of defending the suit; (2) the amount recovered from the insured, either by way of judgment or settlement; and (3) any additional damages caused by the insurer's breach of contract. *See,* for a recitation of the elements of the Illinois rule, *Solo Cup Co. v. Federal Ins. Co.,* 619 F.2d 1178 at 1184 (7th Cir.1980).
>
> We decline to adopt the Illinois rule. We question the propriety of utilizing a form of estoppel as a punitive measure against an insurer for breach of a contractual duty to defend. Rather, we believe the sanctions for that breach should be governed by ordinary principles of contract law. In Idaho, the purpose of awarding damages for breach of contract is to fully recompense the non-breaching party for its losses sustained because of the breach, not to punish the breaching party. *Anderson v. Gailey,* 100 Idaho 796, 606 P.2d 90 (1980).

Hirst v. St. Paul Fire & Marine Ins. Co., 106 Idaho 792, 799, 683 P.2d 440, 447 (Ct. App. 1984).

In Mr. Ferguson's affidavit, plaintiff attempts to make an initial showing of the reasonableness of the settlement. However, as previously explained to the Court, plaintiff has not provided defendant with a number of long-outstanding discovery items related to the litigation and settlement of the *Paradis* matter, including:

1) All exhibits to the depositions taken in the *Paradis* matter;

2) A fully executed copy of the *Paradis* settlement agreement between Kootenai County and Mr. Paradis;

3) Copies of correspondence between the parties to the *Paradis* matter relating to such settlement;

4) Copies of the settlement agreement(s) in the *Paradis* action relating to Mr. Haws and Mr. Elliott; and

5) Mediation statements from the *Paradis* matter.

See also Memorandum in Support of Defendant Northland Insurance Companies' Motion for Summary Judgment, at pp. 49-50. Although plaintiff wishes to demonstrate the reasonableness of the settlement at this juncture, plaintiff has withheld documents necessary to analyze that issue, rendering defendant unable to fully and fairly respond to such assertions. Further, based upon the documents currently in hand, there is a suggestion that the settlement was unreasonable: although *Paradis* was settled for $800,000 under the 2000-2001 ICRMP policy, such policy only provides for $500,000 each loss/occurrence combined single limit for Section IIA & C (and Secton IV) coverages "for claims brought pursuant to Title 6, Ch. 9, Idaho Code" (the Idaho Tort claims act – Mr. Paradis filed a Notice of Tort Claim with Kootenai County on October 9, 2001 (Counsel Aff., Exh. D, at ¶17)), potentially reflecting a payment by ICRMP in excess of its own limits, especially where, as here, ICRMP asserts that all damages are attributable to a single "occurrence" during the ICRMP/Northfield coverage period (2000-2001). Counsel Aff., Exh. I, at D-2. Additionally, as discussed earlier, Northfield's obligation to reimburse, if any, would have been triggered by the exhaustion of ICRMP's SIR of $150,000 – however, Northfield was not notified of any such exhaustion until on or about June 27, 2006, *after* ICRMP had expended $423,305.33 in defense costs, exceeding its SIR layer by $273,305.33. Complaint, Exh. F.

Moreover, these issues are not salient to the scope of defendant's motion for summary judgment, and should be ignored at the summary judgment stage of proceedings. *See, e.g.,* Progressive Ins. Co. v. Universal Cas. Co., 807 N.E.2d 577, 589-90 (Ill. App. 2004) ("However, the considerations affecting the voluntariness of a settlement, such as whether an excess insurer's anticipation of liability was reasonable and whether the settlement was arrived at in good faith, are, like the issue of notice, questions of fact not appropriately determined at the summary judgment stage of the proceedings.").

As such, the Court should disregard plaintiff's arguments on this point, and grant defendant's motion for summary judgment.

CONCLUSION

For the reasons stated above, defendant Northfield should be granted summary judgment, and plaintiff's Complaint should be dismissed with prejudice. Northfield's policy simply does not provide coverage of ICRMP for the *Paradis* action, ICRMP's costs of defense, or any amount above its SIR which ICRMP paid.

DATED this 7th day of May, 2007.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By _____
Donald J. Farley - Of the Firm
Bryan A. Nickels – Of the Firm
Attorneys for Defendant Northland
Insurance Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of May, 2007, I caused to be served a true copy of the foregoing **REPLY IN SUPPORT OF DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT**, by the method indicated below, and addressed to each of the following:

Phillip J. Collaer
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

___ U.S. Mail, Postage Prepaid
X Hand Delivered
___ Overnight Mail
___ Telecopy

_____
Donald J. Farley
Bryan A. Nickels

Phillip J. Collaer, ISB No. 3447
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: pcollaer@ajhlaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff,

vs.

NORTHLAND INSURANCE COMPANIES, a Minnesota corporation,

Defendant.

Case No. CV OC 0617112

ORDER GRANTING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

The Court having heard oral arguments regarding the plaintiff's motion for summary judgment, and having considered the stipulations of the parties during oral arguments, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1) That ICRMP was obligated, pursuant to the policy of insurance it sold to Kootenai County, to provide a defense to its insureds for the lawsuit filed by

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Donald Paradis filed in the Federal Court for the District of Idaho described as ***Paradis v. Brady, et al***, Case No. CIV-03-01-50-N-BLW; for that reason:

2) The plaintiff's motion for partial summary judgment IS GRANTED.

DATED this 29 day of May, 2007.

The Hon. Darla S. Williamson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29 day of May, 2007, I served a true and correct copy of the foregoing **ORDER GRANTING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Donald J. Farley
Bryan A. Nickels
Hall, Farley, Oberrecht & Blanton, PA
702 W. Idaho, Suite 700
PO Box 1271
Boise, Idaho 83701-1271

- ☒ U.S. Mail, postage prepaid
- ☐ Hand-Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Electronic Delivery

Phillip J. Collaer
Anderson Julian & Hull, LLP
250 S. Fifth St., Ste. 700
PO Box 7426
Boise, Idaho 83707

- ☒ U.S. Mail, postage prepaid
- ☐ Hand-Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Electronic Delivery

Janine Bowen
Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff, vs. NORTHLAND INSURANCE COMPANIES Defendants.	Case No. CV-OC-0617112 MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Hearing Date: May 17, 2007
Attorneys: Plaintiff—Donald J. Farley (Hall Farley)
Defendants—Phillip J. Collaer (Anderson, Julian, & Hull)

Hearing Purpose: Defendant Northland's Motion for Summary Judgment

Before the court for decision is Defendant Northland's Motion for Summary Judgment.

I. FACTS AND PROCEDURAL BACKGROUND:

This case arises out of an insurance coverage dispute. The central controversy arises from a lawsuit filed in Federal Court by Donald M. Paradis against various Idaho Counties Risk Management Program Underwriters' ("ICRMP") insureds, including Kootenai County, and other individuals. During the relevant periods, ICRMP purchased what it is calling reinsurance from Defendant Northland[1] ("Northland"). ICRMP defended its insureds in the *Paradis* lawsuit under a reservation of rights. Northland has denied coverage, taking the position that the Northland policy does not cover the occurrence in question.

ICRMP was created in 1985 and sold insurance to its member insureds. During that period ICRMP purchased what it describes as "reinsurance"[2] from Northland.[3] In 2003, Donald Paradis filed a complaint in the Federal District Court for the District of Idaho alleging, *inter alia*, false arrest, false imprisonment, detention, and negligence, all of which were alleged violations of his federally protected civil rights and state law. Following the filing of the *Paradis* Complaint, Kootenai County forwarded the Complaint to ICRMP for its review and determination on a duty to defend. Upon review of the Complaint, ICRMP determined that based on the facts and legal theories alleged there was a legal duty to defend on the claims of negligent and intentional inflictions of emotional distress and failure to train. The duty to defend was held with a reservation of rights which was forwarded to Northland.

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[1] Northland Insurance Company is also identified as Northfield Insurance Company. For purposes of this motion, the Court will use Northland to reference both in keeping with the symmetry of the pleading caption.

[2] ICRMP describes the supplemental insurance as reinsurance while Northland would characterize the insurance policy as reimbursement insurance.

[3] ICRMP argues that this insurance was purchased from its inception while Northland argues that company records indicate that policies were issued to ICRMP for 1986-1988 and 1994-2001.

After ICRMP undertook the defense of the *Paradis* litigation, motions to dismiss were filed and granted in part in that case. The Court therein declined, however, to dismiss the constitutional claims and the state law claims which were based upon continuing torts. Soon thereafter, Mr. Paradis filed an amended complaint clarifying the legal theories and factual allegations against the ICRMP insureds. ICRMP's determination that it had a duty to defend did not change.[4]

Before the Court is Defendant Northland's Motion for Summary Judgment seeking a determination that there was no "occurrence" during the Northland Policy period and as such, no duty to indemnify for either the settlement or defense. This Court has previously determined on summary judgment that ICRMP had a duty to defend in the *Paradis* action..

II. DEFENDANT'S ARGUMENTS:

In bringing the motion for summary judgment, Northland's focus is on the alleged lack of coverage for the ICRMP *Paradis* settlement and the costs incurred in the defense of that action. Specifically, Northland argues the claims in *Paradis* which were resolved by settlement – Count I (§1983: Failure to Train re: *Brady*) against Kootenai County; Count X(1) (Negligent Infliction of Emotional Distress) against Haws; and Count X(2) (Intentional Infliction of Emotional Distress) against Haws- are not covered under either Section II or Section IV[5] of the Northland Policy. Northland also argues the defense costs incurred by ICRMP are not covered under the Northland Policy, either for the period following the filing of the first *Paradis* Complaint or the

[4] ICRMP found that a duty to defend resulted only on three of the surviving claims, Count I (§1983: Failure to Train re: *Brady*) against Kootenai County; Count X(1) (Negligent Infliction of Emotional Distress) against Haws; and Count X(2) (Intentional Infliction of Emotion Distress) against Haws. These are the only Counts considered by the Court.

[5] During oral arguments all parties agreed that Section IV is not at issue and therefore the Court will not address whether Section IV was triggered or the impact of that Section on this action.

period following the filing of the First Amended Complaint in *Paradis*. Finally, Northland attempts to characterize the policy as a reimbursement policy because the Northland Policy lacks the hallmarks of reinsurance, in that it does not contain follow-the-form, or follow-the-fortunes clauses of the ICRMP policy, so claims made against it must instead be analyzed under the Northland Policy's own coverage terms and conditions.

III. PLAINTIFF'S ARGUMENTS:

Initially, ICRMP reiterates the duty it had to defend Kootenai County against the *Paradis* complaint.[6] ICRMP then argues that the Amended Complaint describes an occurrence which caused personal injury during the Northland and ICRMP policy periods. Specifically, ICRMP argues that the resulting injuries were continuing torts which are covered "occurrences" as defined in the general liability insuring agreement. Finally, ICRMP argues that the Northland policy contains all of the classic hallmarks of reinsurance. That is, that the policy achieved concurrency between the coverage's afforded by the primary and reinsurance policy, that Northland policy required ICRMP to "investigate and settle or defend all claims or losses." (Northfield Policy, p. 5).

IV. LEGAL STANDARD:

Summary judgment is an appropriate remedy if the nonmoving party's "pleadings, affidavits, and discovery documents..., read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002)

[6] During the course of the hearing, Northland conceded that it would withdraw the defense of ICRMP's duty to defend in the *Paradis* case. This stipulation has been reduced to an Order Granting Plaintiff's Partial Motion for Summary Judgment dated May 29, 2007.

(quoting I.R.C.P. 56). The moving party is entitled to judgment as a matter of law when the nonmoving party has failed to show an element essential of her case as to which the nonmoving party will bear the burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).[7]

The burden of proving the absence of material fact is placed upon the moving party. *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 205, 61 P.3d 557, 562 (2002); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868, 452 P.2d 362, 365 (1969); *Blickenstaff v. Clegg*, 140 Idaho 572, 577, 97 P.3d 439, 444 (1969); *Thomson*, 137 Idaho at 476, 50 P.3d at 491. In *Celotex*, the U.S. Supreme Court held that there is no need to negate the nonmoving party's case; instead, the moving party's burden is discharged when she shows there is no evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. Meanwhile, the adverse party may not rest on "mere allegations or denials of his pleadings, but must respond, by affidavits or as otherwise provided in this rule, setting forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). *See Thomas*, 138 Idaho at 205; *Thomson*, 137 Idaho at 476, 50 P.3d at 491; *Blickenstaff*, 140 Idaho at 577, 97 P.3d at 444. The adverse party must make more than just "conclusory assertions" and, indeed, a mere scintilla of evidence is not enough. *Blickenstaff*, 140 Idaho at 577, 97 P.3d at 444.

In making its determination, the court must consider all affidavits, depositions, and interrogatories in conjunction with the pleadings and, in effect, "pierce the formal allegations." *Petricevich*, 92 Idaho at 868. Evidence should be considered in the light most favorable to the nonmoving party (*Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)), meaning

[7] Summary judgment, as a procedural mechanism, is not to be regarded as a "disfavored procedural shortcut," but instead an "integral" component of the rules of civil procedure, "designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (citing F.R.C.P. 1). This is equally true for summary judgment as found in the Idaho Rules of Civil Procedure, which is an identical procedural mechanism and is intended to serve the same role as its federal counterpart.

summary judgment is improper "if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions." *Thomas*, 138 Idaho at 205. If the evidence reveals no disputed issues of material fact, then only a question of law remains on which the court may then enter summary judgment as a matter of law. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003).

V. ANALYSIS:

Three issues have been raised by the Parties. First, the Court will address whether there was an occurrence under the Northland Policy and the date of the occurrence. Second, the Court will determine whether there is a duty to indemnify ICRMP for its' defense of the *Paradis* suit. Finally, the Court will address the issue of whether the Northland Policy can be classified as reinsurance.

The court will note at the outset that the legal questions are complex and the law unclear. It is understandable that two excellent attorneys are in disagreement on the legal interpretations of these issues.

A. "Occurrence" Under the Northland Policy:

At issue is Northland's occurrence policy covering the period from October 2000, through October 2001. "An 'occurrence' policy protects the policy holder from liability for any act done while the policy is in effect." *St. Paul Fire and Marine Insurance Co. v. Barry*, 438 U.S. 531, 535 n.3, 98 S.Ct. 2923, 2927 n.3 (1978). The Northland policy provides under Section II as follows:

This Section applies only to bodily injury, personal injury or property damage which occur during the policy period and arise out of an occurrence which takes place within the territorial scope of the Policy.

> A. COMPREHENSIVE GENERAL LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums, including expenses, all as more fully defined by the term ultimate net loss, which the Assured shall become legally obligated to pay as damages imposed by law because of bodily injury, property damage, personal injury, advertising injury, products liability and or completed operations host/liquor liability or incidental malpractice which result from an occurrence and which occur during the policy period.
>
> . . .
>
> C. LAW ENFORCEMENT LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of errors, omissions or negligent acts arising out of the performance of the Assured's duties while acting as a law enforcement official or officer in the regular course of public employment as hereinafter defined, arising out of any occurrence from any cause on account of Personal Injury, Bodily Injury, Property Damage, Violation of Civil Rights or First Aid, happening during the period of this insurance except as covered under Section II A and B.

(Northland Policy, p. 13). The policy goes on to further define an "occurrence" as:

> For Section II, "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which result in personal injury or damage to property during the policy period. All personal injuries to one or more persons and/or property damage arising out of an accident or a happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

(Northland Policy, p. 6).

Whether an insurance policy is ambiguous is a question of law, which this Court freely reviews. *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 739, 101 P.3d 226, 232 (2004). A policy "is ambiguous if 'it is reasonably subject to conflicting interpretations.'" *Cascade Auto*

Glass, Inc. v. Idaho Farm Bureau Ins. Co., 141 Idaho 660, 663, 115 P.3d 751, 754 (2005). Any ambiguities in an insurance policy must be construed against the insurer; however, a court should not torture the language to create an ambiguity where none exists. *Farmers Ins. Co. of Idaho v. Talbot,* 133 Idaho 428, 435, 987 P.2d 1043, 1050 (1999). However, where the policy language is clear and unambiguous, "coverage must be determined in accordance with the plain meaning of the words used." *Mutual of Enumclaw Ins. Co. v. Roberts,* 128 Idaho 232, 235, 912 P.2d 119, 122 (1996). Only where reasonable intelligent men, considering the word in the context of the entire policy, would honestly differ as to its meaning, will an ambiguity be found. *Id.*

Here, the Northland policy is clearly an occurrence policy based on the unambiguous language and the applicable policy provisions, considered in their entirety. No ambiguity exists in the policy language and it is clear that only acts done while the policies were in effect were covered. Each policy specifically focuses on the act causing injury as the coverage "trigger" and specifically requires this injury to occur during the applicable policy period.

Of central focus is when did the tortious conduct "occur" for purposes of insurance coverage? Much has been made about the difference between claim accrual for purposes of the statute of limitation and an occurrence for purposes of insurance coverage. The distinction is important and has been more fully discussed by other courts:

> Reliance on the commencement of the statute of limitation is not dispositive in determining when a tort occurs for insurance purposes. Statutes of limitation and triggering dates for insurance purposes service distinct functions and reflect different policy concerns. Statutes of limitation function to expedite litigation and discourage state claims. But when determining when a tort occurs for insurance purposes, courts have generally sought to protect the reasonable expectations of the parties to the insurance contract. Because of this fundamental difference in purpose, courts have consistently rejected the idea they are bound by the statutes of limitation when seeking to determine when a tort occurs for insurance purposes.

City of Erie, Pennsylvania v. Guaranty Nat. Ins. Co., 109 F.2d 156, 161-62 (3rd Cir. 1997) (citations omitted). As indicated by other courts, it is irrelevant to the analysis whether a claim is preserved for purposes of pursuing the claim. At issue here, is who will cover the tortious conduct based on the insurance contract.

In order for the Court to establish whether there was an occurrence within the policy period, as such, the Court must first, identify the occurrence and then, determine when it took place. Generally, an occurrence is determined by the cause or causes of the tortious conduct. That is, the Court is to determine if there was "but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage." *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3rd Cir. 1982) (citations omitted). In applying this test, the Court finds that there was only one proximate cause for the wrongful imprisonment of Mr. Paradis and the damages that resulted from it; the failure to make the *Brady* disclosures and therefore, the failure to train properly regarding the *Brady disclosures*. It was this failure that caused the errors that led to the wrongful imprisonment in Idaho and the resulting infliction of emotional distress claims. Had the *Brady* training occurred, the exculpatory evidence should have been disclosed preventing the imprisonment of Mr. Paradis in Idaho and accordingly, his emotional distress claims. For that reason, the Court views the occurrence as being the failure to train regarding *Brady* requirements.

However, the crucial issue is determining when the occurrence took place because only if it took place within the policy period is Northland required to cover the *Paradis* suit. While the law is less than clear on the issue, the Court has reviewed other cases that can be applied by analogy to determine that the occurrence here was about 1980 to 1981, that is when the failure to train regarding *Brady* disclosures occurred. The Court will set forth the reasoning below.

In *Appalachian Insurance Co.*, the court was faced with a similar determination of the time period in which an occurrence had resulted leading to the injury. There the injury of discriminatory employment policies were first adopted in 1965 but the results of the policies were not felt until some years later, with the injury being a continuous one. The timing of the occurrence was important as multiple insurance policies could be triggered. In addressing when the injury had occurred, the Court adopted the "effect" test ultimately holding that "the occurrence [took] place when the injur[y] first manifest [itself]." *Id.* at 63. The Court reasoned that the injuries to the employees occurred immediately upon the promulgation of the discriminatory policies not when the impact of those illegal policies was felt or the damage resulted. *Id.*

In *Kootenai County v. Western Cas. and Sur. Co.*, 113 Idaho 908, 750 P.2d 87 (1988), the Idaho Supreme Court faced the question of whether an improper execution sale which occurred about six months prior to the effective date of an occurrence policy was a covered occurrence because the effects or damages were realized during the insurance policy period. In *Kootenai County*, the sheriff negligently conducted an execution sale without complying with the statutory requirements concerning notice. The dispute arose because two policies could potentially be at risk to cover the injury because a second policy was secured about six months after the sheriff's failures but during the period of time when the damages became apparent. In determining when the event occurred for purposes of coverage, the Idaho Supreme Court held "[a]n insurer is not liable 'for claims arising out of an event or accident which occurred prior to the effective date of the insurance coverage, even though damages and claims continue to accrue from this cause during the later period of coverage.'" *Id.* at 915, 750 P.2d at 94 (citing *Appalachian Ins. Co. v.*

Liberty Mutual Ins. Corp., 507 F.Supp. 59, 62 (W.D.Pa. 1981) (aff'd, 676 F.2d 56 (3rd Cir. 1982).

It is these two cases that the Court finds most persuasive in holding that the occurrence here happened when Kootenai County initially failed to train its' employees regarding the *Brady* disclosures. While the failures where alleged to have been on-going by Mr. Paradis, the fact remains, that much like the *Appalachian* employment manual, the initial failure to train resulted in the continuous injuries, this was the period when the injury was first manifest. The resultant situation was that an injury was manifest in 1980 with damages and claims continuing to accrue up until the release of Mr. Paradis from the penitentiary. Simply put, this is not a situation where the cause of the injury is difficult to ascertain and would be properly applied using the continuous torts doctrine. Rather, there was a single occurrence that had a continued and lasting effect causing many years of damage. As such, the Court finds that no coverage exists for ICRMP under the Northland policy because there was no occurrence during the policy period.

ICRMP advanced a theory that the Northland policy covered the tortious conduct because the actions were continuous torts and the language within the policy states, ". . . an accident or happening or event or a *continuous or repeated exposure to conditions which result in personal injury* or damage to property during the policy period." (Northland Policy, p. 6). However, the Court's reading of this provision acknowledges a continuous or repeated exposure but the follows up with the modifier that the injury results "during the policy period." *Id.* The Court finds that the continued exposure must occur during the policy period. Again, the focus is on when the injury manifest itself not that the injury continued into the policy period. It is the Court's view that coverage will be provided for a multitude of events, so long as they occur while the policy is in effect.

B. Indemnity for ICRMP's Defense:

The next issue which must be addressed is whether Northland was required to reimburse ICRMP for defending against the *Paradis* suit. Similar to the above discussion if there was no coverage under the Policy, there would likewise be no duty to reimburse for defending against a claim not covered by the policy. Again, Northland, when it issued the coverage, agreed to "indemnify . . . for all sums, including expenses . . . which the Assured shall become *legally obligated to pay* as damages imposed by law." (Northland Policy, p. 13). If there is no coverage, it follows that there can be no legal obligation to indemnify because there would be no legal obligation to pay. As such, because the triggering occurrence happened outside the policy period, there would be no legal obligation to indemnify or reimburse for defending against the *Paradis* suit.

C. Reinsurance Issue:

While the issue of whether the Northland Policy can be characterized as reinsurance or reimbursement insurance, the distinction is irrelevant at this point in time. Upon a closer review of Northland's papers, the Court would acknowledge that the issue, while discussed at length, appears to be a discussion of the Policy in response to issues raised in ICRMP's prior partial motion for summary judgment. Of note is the first line in Northland's opening brief wherein they state, "Plaintiff has previously asserted that the Northfield Policy is 'reinsurance.'" (Northland Memo in Support of Summary Judgment, p. 47). The discussion appears to be directed at illustrating the distinction but not for purposes of summary judgment. This is true especially in light of the conclusion of the discussion where no request for summary judgment is

made. This finding is further bolstered by the fact that the Conclusion makes no attempt to have a finding made regarding the classification of the insurance. While significant lip service was given to the issue, it does not appear to be an issue raised on summary judgment. Accordingly, the issue of whether the Northland Policy is reinsurance can be left for another day.

VI. CONCLUSION:

Based on the above discussion, the Court finds that there was no "occurrence" within the Northland Policy period and therefore, there is no duty to indemnify for either the settlement or the defense costs. Also, the Court will not address whether the Northland Policy is reinsurance. Accordingly, Defendant Northland's Motion for Summary Judgment is GRANTED in full.

Dated this 6th day of June, 2007

Darla Williamson

Darla Williamson, District Judge

I hereby certify that on this date I mailed a true and correct copy of the foregoing to

Phillip J. Collaer
P.O. Box 7426
Boise, Id 83707-7426

Donald J. Farley
P.O. Box 1271
Boise, ID 83701

[redacted], Deputy Court Clerk

FILED

NO. _____

FILED A.M. _____ P.M. 4:30

JUN 22 2007

J. DAVID NAVARRO

By _____

COURT CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff, vs. NORTHLAND INSURANCE COMPANIES, Defendant.	Case No. CV OC 0617112 **JUDGMENT**

BASED UPON the Court's Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment, filed June 11, 2007, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's complaint is hereby DISMISSED with prejudice in its entirety.

Any request for attorney fees and costs sought by defendant will be addressed by the Court following submission of a memorandum of costs and attorney fees in accordance with the Idaho Rules of Civil Procedure.

IT IS SO ORDERED. dcd.

DATED this 22nd day of June, 2007.

Darla Williamson

The Hon. Darla S. Williamson
District Judge

000203

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CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of June, 2007, I caused to be served a true copy of the foregoing **JUDGMENT**, by the method indicated below, and addressed to each of the following:

Phillip J. Collaer
ANDERSON, JULIAN & HULL, LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

X U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy

Donald J. Farley
Bryan A. Nickels
HALL, FARLEY, OBERRECHT & BLANTON
702 West Idaho, Suite 700
P. O. Box 1271
Boise, ID 83701
Fax: (208) 395-8585

X U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Telecopy

CLERK OF THE COURT

By Janine Bowen
Deputy Clerk

Phillip J. Collaer, ISB No. 3447
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: pcollaer@ajhlaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff/Appellant,

vs.

NORTHLAND INSURANCE COMPANIES, a Minnesota corporation,

Defendant/Respondent.

Case No. CV OC 0617112

NOTICE OF APPEAL

Fee Category: T
Fee: $95.00

TO : THE ABOVE-NAMED RESPONDENT AND ITS ATTORNEYS OF RECORD AND TO THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant appeals against the above-named Respondent to the Idaho Supreme Court from the Memorandum Decision and Order Granting Defendant's Motion for Summary Judgment issued on June 11, 2007, the Honorable Darla Williamson presiding.

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2. Said Appellant has a right to appeal to the Idaho Supreme Court, and the judgment and order described in Paragraph 1, above, is an appealable order under and pursuant to IAR 11(a)(1).

3. A preliminary statement of issues on appeal:

(a) Whether the District Court erred by granting the Respondent's (Northland Insurance Companies) Motion for Summary Judgment.

4. The Appellant requests the preparation of the standard Reporter's Transcript relating to the hearing conducted May 17, 2007.

5. The Appellant requests the following documents to be included in the Clerk's Record in addition to those automatically included under Rule 28, IAR:

(a) Plaintiff's Motion for Partial Summary Judgment filed November 17, 2006;

(b) Affidavit of Lynnette McHenry in Support of Plaintiff's Motion for Partial Summary Judgment filed November 17, 2006.

(c) Affidavit of Brian R. Martens in Support of Defendant's Response to Plaintiff's Motion for Partial Summary Judgment filed December 11, 2006;

(d) Affidavit of Donald J. Farley in Furtherance of Defendant Northland's Rule 56(f) Motion and in Opposition to Plaintiff ICRMP's Motion for Partial Summary Judgment filed December 11, 2006;

(e) Defendant Northland Insurance Companies' Motion for Summary Judgment filed March 1, 2007;

(f) Affidavit of Donald J. Farley in Support of Defendant Northland Insurance Companies' Motion for Summary Judgment filed March 1, 2007;

(g) Affidavit of Bryan A. Nickels in Support of Defendant Northland Insurance Companies' Motion for Summary Judgment filed March 1, 2007;

(h) Affidavit of Brian R. Martens in Support of Defendant Northland Insurance Companies' Motion for Summary Judgment filed March 1, 2007;

(i) Affidavit of Richard B. Ferguson in Opposition to ICRMP's Motion for Summary Judgment filed April 23, 2007;

(j) Order Granting Plaintiff's Partial Motion for Summary Judgment dated June 6, 2007;

(k) Memorandum Decision and Order Granting Defendant's Motion for Summary Judgment dated June 11, 2007.

6. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter;
(b) That the reporter has been paid the estimated fee for preparation of the transcript;
(c) That the estimated fee for preparation of the Clerk's Record has been paid;
(d) That the appellate filing fee has been paid; and
(e) That service has been made upon all parties required to be served pursuant to Rule 20, IAR.

DATED this 3 day of July, 2007.

ANDERSON, JULIAN & HULL LLP

By Phillip J. Collaer
Phillip J. Collaer, Of the Firm
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3 day of July, 2007, I served a true and correct copy of the foregoing **NOTICE OF APPEAL** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Donald J. Farley
Bryan A. Nickels
Hall, Farley, Oberrecht & Blanton, PA
702 W. Idaho, Suite 700
PO Box 1271
Boise, Idaho 83701-1271

- [x] U.S. Mail, postage prepaid
- [ ] Hand-Delivered
- [ ] Overnight Mail
- [ ] Facsimile
- [ ] Electronic Delivery

Phillip J. Collaer

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant Northland Insurance Companies,
Properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff/Appellant,

vs.

NORTHLAND INSURANCE COMPANIES,

Defendant/Respondent.

Case No. CV OC 0617112

REQUEST FOR ADDITIONAL DOCUMENTS ON APPEAL

COMES NOW Defendant/Respondent Northland Insurance Companies, properly identified as Northfield Insurance Company (hereinafter "Northfield"), pursuant to I.A.R. 28(c),

and hereby requests additional documents to be included in the Clerk's Record on Appeal, in addition to those automatically included under Rule 28, IAR, and otherwise identified in plaintiff/appellant's Notice of Appeal. Specifically defendant/respondent Northfield requests the following documents be added:

1. MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, filed November 17, 2006;

2. DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, filed December 12, 2006;

3. AFFIDAVIT OF BRIAN R. MARTENS IN SUPPORT OF DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, filed December 12, 2006;

4. REPLY MEMORANDUM IN SUPPORT OF ICRMP'S MOTION FOR PARTIAL SUMMARY JUDGMENT, filed December 19, 2006;

5. DEFENDANT NORTHLAND INSURANCE COMPANIES' REPLY BRIEF IN SUPPORT OF RULE 56(F) I.R.C.P. MOTION RE: IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS' MOTION FOR PARTIAL SUMMARY JUDGMENT, filed January 17, 2007;

6. AFFIDAVIT OF DONALD J. FARLEY IN FURTHERANCE OF DEFENDANT NORTHLAND'S RULE 56(F) MOTION AND IN OPPOSITION TO PLAINTIFF ICRMP'S MOTION FOR PARTIAL SUMMARY JUDGMENT, filed January 17, 2007;

7. MEMORANDUM IN SUPPORT OF DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT, filed March 1, 2007;

8. ORDER GRANTING DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR OVERLENGTH BRIEF AND MEMORANDUM IN SUPPORT, filed March 5, 2007;

9. PLAINTIFF'S RESPONSE TO NORTHLAND/NORTHFIELD INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT, filed April 23, 2007;

10. REPLY IN SUPPORT OF DEFENDANT NORTHLAND INSURANCE COMPANIES' MOTION FOR SUMMARY JUDGMENT, filed May 7, 2007; and

11. JUDGMENT, filed June 22, 2007.

Additionally, defendant/respondant requests the preparation of the standard Reporter's Transcript relating to the hearing conducted on **January 25, 2007**.

DATED this 16th day of July, 2007.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

#6432

By _____
Donald J. Farley - Of the Firm
Attorneys for Defendant Northland Insurance Companies, Properly identified as Northfield Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of July, 2007, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Phillip J. Collaer
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

___ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
X Telecopy

_____
Donald J. Farley

000211

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS,

Plaintiff,

vs.

NORTHLAND INSURANCE COMPANIES,

Defendant.

Case No. CV-oc 0617112

MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S OBJECTION TO COSTS

The Court heard argument on Plaintiff's Objection to Costs on September 12, 2007.. Appearing on behalf of Plaintiff was Mark Sebastian, and Bryan A. Nickels appeared on behalf of the Defendants.

FACTS AND PROCEDURAL BACKGROUND:

This case was a breach of indemnity contract claim against Defendant Northland.[1] Plaintiff ICRMP sought to enforce a contract clause that obligated Northland to "indemnify [ICRMP] for all sums which [it] shall be obligated to pay by reasons . . . of negligent acts arising

1. Northland Insurance Company is also identified as Northfield Insurance Company. The Court will use Northland to reference both in keeping with the symmetry of the pleading caption.

out of [ICRMP]'s duties . . . ." during the policy period.[2] The issues discussed before dismissal were: 1) whether ICRMP was required to defend Kootenai County in the *Paradis* lawsuit;[3] and 2) whether the *Paradis* settlement and related defense costs were covered by Northland's policy with ICRMP. On May 15, 2007, the Court granted ICRMP's partial motion for summary judgment and determined that ICRMP was required to defend Kootenai County in the *Paradis* lawsuit. On June 11, 2007, the Court granted Northland's motion for summary judgment and determined that the *Paradis* lawsuit was not covered by the Northland policy because no "occurrence" happened during the policy period, and thereby dismissed the complaint.

Before the court is Northland's request for fees and costs in the amount of $1,524.23. Northland filed a memorandum of costs pursuant to I.R.C.P. 54(d) supported by an affidavit on June 25, 2007. Northland claims $58 in filing fees and $173.40 for the costs of exhibits—specifically six affidavits—as costs as of right.[4] The affidavits were calculated at .10 per page, with one copy for the Court and one for opposing counsel. Northland further requests $1,292.83 in discretionary costs, including: photocopies/scanning at $854.10,[5] FedEx at $37.63, PACER records regarding the *Paradis* lawsuit at $108, Westlaw at $292.04, and $1.06 in long distance phone calls. Northland has included the affidavit of Bryan A. Nickels in support of these costs, and also Exhibit A in camera, which includes an itemized billing summary.

LEGAL STANDARD & ANALYSIS:

The determination of costs is left to the sound discretion of the district court. *Idaho Department of Health and Welfare v. Southfork Lumber Co.,* 123 Idaho 146, 149, 845 P.2d 564,

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2. (Martens Aff., Ex. A, at 17., Dec. 12, 2006) Clause "A—Comprehensive General Liability" provided that Northland agreed to "indemnify the Assured for all sums, including expenses . . . which the Assureds shall become legally obligated to pay as damages imposed by law . . . ." *Id.*

3. Northland specifically denied this: "Plaintiff undertook the defense of Kootenai County and its employees and settled with Paradis without contractual obligation to do so [therefore] Defendant has no obligation to indemnify or reimburse Plaintiff." (Answer 6.)

4. **Affidavits in support of Defendant's Rule 56(f) Motion**: 1) Donald J. Farley on December 11, 2006 (15 pages) and; 2) on January 17, 2007 (8 pages). **Affidavits in support of Defendant's Motion for Summary Judgment**: 1) Donald J. Farley on March 1, 2007 (460 pages); 2) Bryan A. Nickels on March 1, 2007 (74 pages) and; 3) Brian R. Martens on and March 1, 2007 (155 pages). **Affidavit in support of Defendant's Objection to Plaintiff's Motion for Summary Judgment**: 1) Brian R. Martens on December 12, 2006 (155 pages).

5. 8,541 copies @ .10 per page.

567 (1993). The burden is on the party opposing the award to demonstrate an abuse of the court's discretion and absent an abuse of discretion, the court's award of costs will be upheld. *Bingham v. Montane Resource Associates,* 133 Idaho 420, 425, 987 P.2d 1035, 1040 (1999); *Durrant v. Christensen,* 117 Idaho 70, 72, 785 P.2d 634, 636 (1990).

A. Costs as a Matter of Right:

When costs are awarded to a prevailing party, Idaho Rule of Civil Procedure 54(d) (1) (C) allows certain costs to be recovered as a matter of right.

1. $58.00 filing fee. ICRMP concedes the $58.00 in filing fees.

2. Exhibit costs

Included in this category of costs as a matter of right are "Reasonable costs of the preparation of . . . exhibits admitted in evidence as exhibits in a hearing. . ."

Northland states that the Exhibit costs of $173.40 (copying costs) were necessary and not incurred for purposes of harassment or increasing the costs of litigation. Northland asserts that exhibits must be attached to an affidavit when no live testimony is allowed at a hearing and that affidavits in summary judgment proceedings are on par with trial exhibits.

ICRMP argues that "exhibits" include demonstrative items or materials used by a witness to explain or enhance his/her testimony, but does not include affidavits, which are the direct testimony of an individual witness. By ICRMP's reasoning, costs would be recoverable if a witness testified in person, but not if the witness provided testimony in writing. ICRMP further argues that photocopies are *only* allowable as discretionary costs. This argument fails, because I.R.C.P. 54(d) (1) (C) (10) allows charges for one copy of any deposition. To construe the rule to disallow exhibits attached to affidavits would remove the most obvious meaning of the rule, and would render the phrase "or other exhibits" a nullity. Therefore, the Court holds that exhibits attached to affidavits are "exhibits" for purposes of I.C.R.P. 54(d) (1) (C) (6).

Although Northland claims costs for two copies of each exhibit, the Court will analogize to depositions and only allow costs for one copy. The rule allows costs for the preparation of an exhibit, and does not mention the costs of copies made for the other party. Northland will be

allowed costs as a matter of right in the amount of $68.90 for one copy of each of the three affidavit exhibits filed with the Court in support of its motion for summary judgment.[6]

B. Discretionary Costs:

The Court may in its discretion award a prevailing party discretionary costs where there has been "a showing that the costs are necessary and exceptional, reasonably incurred, and should in the interests of justice be assessed against the adverse party." I.R.C.P. 54(d) (1) (D). When ruling upon objections to discretionary costs, the Court is required to make express findings as to whether the costs are reasonable, necessary, and exceptional and should be awarded against the adverse party in the interests of justice. I.R.C.P. 54(d)(1)(D); *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 60, 995 P.2d 816, 830 (2000) (where trial court failed to describe the circumstances giving rise to its allowing or disallowing certain costs the reviewing court could not determine if the trial court had applied the correct legal standard).

Northland argues that the discretionary costs claimed are exceptional because it had to address ICRMP's partial summary judgment motion that ICRMP had a duty to defend Kootenai County under its own policy, which had no bearing on the decisive issue of the case, which was whether coverage existed under the Northfield policy. Northland argues that the costs were exceptional because the action was not a routine insurance matter, but instead a situation where ICRMP sought coverage for an occurrence dating back two decades before the inception of the policy. Further, Northland argues that the underlying *Paradis* lawsuit required Northland to pay for access to federal records via PACER, and that an award of discretionary costs serves the interests of justice because it provides a small recovery for the expenses incurred by Northland in defending against matters arising 25 years ago, and required addressing matters unrelated to the ultimate issue of the litigation.

ICRMP argues that discretionary costs should be denied because Northland failed to show that the costs were necessary and exceptional and should be imposed against ICRMP in the

---

6. **Affidavits in support of Defendant's Motion for Summary Judgment**: 1) Donald J. Farley on March 1, 2007 (460 pages); 2) Bryan A. Nickels on March 1, 2007 (74 pages) and; 3) Brian R. Martens on and March 1, 2007 (155 pages). 689 pages @ .10 per page.

interest of justice. Computerized research costs should not be allowed because they are a form of attorney's fees rather than costs.

The Court will now address each discretionary cost item requested.

1. Photocopies/scans

Northland's rationale for requesting photocopying costs is that the case was exceptional because it had to defend against ICRMP's motion for summary judgment. As discussed above, that fact does not render the case exceptional. Northland provides no other basis for deeming its photocopying costs exceptional. Although thousands of copies were made and more than $800.00 in costs are claimed, in an indemnity case such as this one involving complicated case law and an uncertain outcome, high copy costs are common. The photocopying costs are not exceptional because they exist in most lawsuits, and therefore the $854.10 in photocopying charges is denied.

2. FedEx

Although the FedEx charges may have been both necessary and reasonable, such costs are not exceptional. Litigation of all types commonly requires express mail service, and therefore the Northland's request for FedEx charges of $37.63 is denied.

3. PACER records access

Northland argues that because it had to access federal records while defending a state case, the costs to access PACER were exceptional. Referencing various documents from other jurisdictions, including the federal courts, is commonplace and not exceptional in litigation. Therefore Northland's request for PACER costs of $108 is denied. Further, fees paid for computer assisted research are akin to Westlaw charges, and are not recoverable as costs.

4. Westlaw

I.R.C.P. 54(e) (3) (K) provides that the court will consider the reasonable cost of computer assisted legal research when determining the amount of *attorney's fees* to be awarded. Because Westlaw charges fall under the category of attorney's fees and not costs, Northland's request for Westlaw costs of $292.04 is denied.

5. Long Distance phone calls

Although the long distance phone calls may have been both necessary and reasonable, they are not exceptional. Litigation of all types commonly requires long distance phone calls, and therefore Northland's request for long distance charges of $1.06 is denied.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Objection to Costs is GRANTED in part and DENIED in part. Defendant is awarded costs of right of $120.90. Requested discretionary costs are disallowed.

IT IS SO ORDERED.

Dated this 13 day of September, 2007.

Darla S. Williamson
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of ~~October~~ September 2007, I caused a true and correct copy of the above and foregoing instrument to be served upon the following individuals in the manner indicated below:

Mark Sebastian, Attorney Anderson, Julian & Hull, LLP P.O. Box 7426 Boise, ID 83707-7426	X U.S. Mail ____ Hand Delivery ____ Federal Express ____ Facsimile Transmission
Brian A. Nickels, Attorney *Hall, Farley, Oberrecht & Blanton* P.O. Box 1271 Boise, Idaho 83701	X U.S. Mail ____ Hand Delivery ____ Federal Express ____ Facsimile Transmission

Dated: 9/20/07 Signed: Miriam Olson

[redacted]
Deputy Court Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff-Appellant, vs. NORTHLAND INSURANCE COMPANIES, a Minnesota corporation, Defendant-Respondent.	Supreme Court Case No. 34375 CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, filed November 17, 2006.
2. Affidavit of Lynnette McHenry in Support of Plaintiff's Motion for Partial Summary Judgment, filed November 17, 2006.
3. Affidavit of Donald J. Farley in Support of Defendant Northland Insurance Company's Rule 56(f) I.R.C.P. Motion Re: Plaintiff ICRMP's Motion for Partial Summary Judgment, filed December 11, 2006.
4. Affidavit of Brian R. Martens in Support of Defendant's Response to Plaintiff's Motion for Partial Summary Judgment, filed December 12, 2006.
5. Reply Memorandum in Support of ICRMP's Motion for Partial Summary Judgment, filed December 19, 2006.
6. Affidavit of Donald J. Farley in Furtherance of Defendant Northland's Rule 56(f) Motion and in Opposition to Plaintiff ICRMP's Motion for Partial Summary Judgment, filed January 17, 2007.
7. Defendant Northland Insurance Companies' Reply Brief in Support of Rule 56(f) I.R.C.P. Motion Re: Idaho Counties Risk Management Program Underwriters' Motion for Partial Summary Judgment, filed January 17, 2007.
8. Memorandum in Support of Defendant Northland Insurance Companies' Motion for Summary Judgment, filed March 1, 2007.

9. Affidavit of Brian R. Martens in Support of Motion for Summary Judgment, filed March 1, 2007.
10. Affidavit of Bryan A. Nickels in Support of Defendant Northland Insurance Company's Motion for Sumary Judgment, filed March 1, 2007.
11. Affidavit of Donald J. Farley in Support of Defendant Northland Insurance Company's Motion for Summary Judgment, filed March 1, 2007.
12. Affidavit of Richard B. Ferguson in Opposition to Defendant's Motion for Summary Judgment, filed April 23, 2007.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 1st day of October, 2007.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICTOF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff-Appellant, vs. NORTHLAND INSURANCE COMPANIES, a Minnesota corporation, Defendant-Respondent.	Supreme Court Case No. 34375 CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

PHILLIP J. COLLAER
ATTORNEY FOR APPELLANT
BOISE, IDAHO

DONALD J. FARLEY
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: JAN 0 8 2008

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff-Appellant, vs. NORTHLAND INSURANCE COMPANIES, a Minnesota corporation, Defendant-Respondent.	Supreme Court Case No. 34375 CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed on the 3rd day of July, 2007.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant Northland Insurance Companies,
Properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff/Appellant, vs. NORTHLAND INSURANCE COMPANIES, Defendant/Respondent.	Case No. CV OC 0617112 **STIPULATION RE: ADDITIONAL TRANSCRIPT ON APPEAL**

COME NOW Defendant/Respondent Northland Insurance Companies, properly identified as Northfield Insurance Company (hereinafter "Northfield"), and Plaintiff/Appellant

Idaho Counties Risk Management Program Underwriters (hereinafter "ICRMP"), pursuant to I.A.R. 29(a), and hereby stipulate to the addition to the transcript on appeal. Specifically, only the transcript for the May 17, 2007 hearing was prepared; however, defendant/respondent Northfield also requested the preparation of the standard Reporter's Transcript relating to the hearing conducted on **January 25, 2007**, as per its Request for Additional Documents on Appeal, filed July 16, 2007.

Accordingly, Northfield and ICRMP stipulate that the transcript on appeal further include the transcript of the hearing conducted on **January 25, 2007**.

DATED this 22 day of January, 2008.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By _____
Donald L. Farley - Of the Firm
Attorneys for Defendant Northland Insurance Companies, Properly identified as Northfield Insurance Company

ANDERSON, JULIAN & HULL, LLP

By _____
Phillip J. Collaer - Of the Firm
Attorneys for Plaintiff Idaho Counties Risk Management Program Underwriters

Donald J. Farley
ISB #1561; djf@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant Northland Insurance Companies,
Properly identified as Northfield Insurance Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO COUNTIES RISK MANAGEMENT PROGRAM UNDERWRITERS, Plaintiff, vs. NORTHLAND INSURANCE COMPANIES, Defendant.	Case No. CV OC 0617112 **ORDER GRANTING STIPULATION RE: ADDITIONAL TRANSCRIPT ON APPEAL**

BASED UPON written stipulation and good cause appearing therefor,

IT IS HEREBY ORDERED that the Stipulation Re: Additional Transcript on Appeal is granted. The Clerk shall cause a transcript of the **January 25, 2007** hearing in this matter to be prepared and submitted with the Clerk's Record and Reporter's Transcript on appeal in this matter.

IT IS SO ORDERED.

DATED this 23 day of January, 2008.

HON. DARLA WILLIAMSON
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of January, 2008, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Donald J. Farley
Bryan A. Nickels
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Fax: (208) 395-8585

X U.S. Mail, Postage Prepaid
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Phillip J. Collaer
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P. O. Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

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Deputy Clerk